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Legal, Policy and Institutional Frameworks for community land rights in the wake of developmental projects in Zimbabwe: Challenges and Way Forward

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Table of Cases and Statutes

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Communal Land Act [Chapter 20:04].
Communal Land Rights Act 11 of 2004.
Communal Property Associations Act 28 of 1996.
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Land Acquisition Act [Chapter 20:10].
Land Commissions Bill H.B. 2, 2016.
Land Reform Act 3 of 1996.
Minerals and Petroleum Resources Development Act Chapter 28 of 2002.
Mines and Minerals Act [Chapter 21:05].
Mines and Minerals Amendment Bill H.B. 19,2015.
Rural District Councils Act [Chapter 29:13].
Rural Land Act [Chapter 20:18].
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Government of the Republic of South Africa and Others V Grootboom and Others 2001 (1) SA 46 (CC).
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Kruse v Johnson [1898] 2 QB 91.
Longman Zimbabwe (Pvt) Ltd. v Midzi and Others (209/06) ((Pvt)) [2008] ZWSC 34 (11 March 2008).
Mahambehlala v Minister of the Executive Council for Welfare, Eastern Cape and another 2002 (1) SA 342 (SE).
Malvern Mudiwa and Others v Mbada Mining Private Limited and Others HC 6334/09.
Marange Development Trust v The District Administrator Mutare District and Others (HC 12237/16).
Marange Development Trust v Zimbabwe Consolidated Diamond Company (Private) Limited and Environmental Management Agency (HC 902/17).
Marega v The Officer in Charge Harare Central Prison and Others HH 3-16.
Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008).
Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC).
President of The Republic of South Africa And Another v Modderklip Boerdery (Pty) Ltd and Others 2005 (5) SA (CC).
Smyth v Ushewokunze and Another 1997 2 ZLR 544 (SC).
Tongoane and Others v Minister of Agriculture and Land Affairs and Others 2010 (6) SA 214 (CC).
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ACRONYMS

ACHPR	African Commission on Human and People's Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEMIRIDE	Centre for Minority Rights Development
CLARA	Communal Land Rights Act
DDF	District Development Fund
DIDR	Development-Induced Displacement and Resettlement
EESCRs	Environmental, Economic, Social and Cultural rights
EIA	Environmental Impact Assessment
EMA	Environmental Management Agency
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investments
FDI	Foreign Direct Investments
FPIC	Free Prior and Informed Consent
FTLRP	Fast Track Land Reform Programme
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MDT	Marange Development Trust
MPRDA	Minerals and Petroleum Resources Development Act
PPBs	Public-Private Businesses
RDCs	Rural District Councils
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UNCESRC	United Nations Committee on Economic, Social and Cultural Rights
UNDRIP	United Nations Declaration of Rights of Indigenous Peoples
ZCDC	Zimbabwe Consolidated Diamond Company
ZELA	Zimbabwe Environmental Law Association
ZGC	Zimbabwe Gender Commission
ZHRC	Zimbabwe Human Rights Commission
Zim-Asset	Zimbabwe Agenda for Sustainable Socio-Economic Transformation
ZLC	Zimbabwe Land Commission

EXECUTIVE SUMMARY

The global developmental goal that Africa has pursued since the demise of colonialism has created new frontiers that have enhanced the nature, rate, and extent of industrialization and investment on the continent. Zimbabwean like other African nations since the turn of the 21st Century has been trying to lure Foreign Direct Investment (FDI) mainly in the energy, mining and agricultural sectors. Whilst developmental projects emanating from these agreements has widened opportunities for socio-economic development to hosting communities and the nation at large, it has become difficult if not impossible to ignore the adverse consequences on communities' access to land, land tenure and security and the enjoyment and exercise by communities of land-related environmental, economic, social and cultural rights as enshrined in the Constitution of Zimbabwe. Importantly, land-based communities are in a conundrum to either accept the new economic system that subordinates their community rights to land or reject and resist at their own peril.

In Zimbabwe, there is ample historical and contemporary evidence of developmental projects not significantly benefiting host communities. For instance, the relocation of the Gwembe Tonga community between 1957-1958 to Binga in order to pave way for the construction of the Kariba dam is largely cited. Recently, the relocation of the Marange community in Manicaland to Arda Transau; the reduction of communities' dry land in Chisumbanje to set up the Ethanol project and the downstream flooding and displacement of families to the construct the Tokwe Mukosi Dam in Masvingo Province have recently come to the fore.

Furthermore, the current model for large-scale investments in Zimbabwe is very different from the previous models where the majority of the investments projects were mainly undertaken by international companies with limited governmental intervention. Currently, most large-scale investment agreements are joint venture agreements bringing together the government, private business, and foreign government-related companies. This new model whilst not new raises questions of whether the government would be able to render its duties impartially where national laws and policies are violated by their investment partners especially when it comes to relocation from the communal land. Against this background, this research seeks to unpack the various pieces of legislation and policies in Zimbabwe that have a direct or indirect bearing on the relocation of communities because of developmental projects. While the author is conscious of the idea that relocation of communities may be inevitable, it is argued that such actions should take into account constitutional provisions, regional and international best practice.

This research paper recognizes the need to view impacts of developmental projects holistically. In that light, the human security approach was adopted. Consideration was paid to the various laws and policies that have a direct and indirect bearing on customary land tenure system with a view of strengthening communities customary land tenure rights in the wake of large-scale investment projects.

To reiterate this proposition, the research undertakes a comparative approach taking cues from South Africa and Kenya being nations that have walked the path aimed at giving effect to their constitutional, regional and international provisions. Notably, these jurisdictions indicate the need to strengthen communities customary law land rights. These jurisdictions indicate the need to accommodate both Western and African construct of property given that the two are founded and operate within different contexts with different requirements aimed at meeting different needs. In this light, these jurisdictions titling is noted as not being the ideal solution but rather indicating to the need to destruct the current land rights regime that elevates ownership rights as being the alpha right in property law. The research indicates the need to reform communal land specific legislation in light of the constitutional provisions. Furthermore, the research posits that the judiciary should develop the understanding of the meaning of property beyond land ownership but to include one's interest or use of the property under discussion.

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION AND BACKGROUND

1.1 Introduction

The global developmental goal that Africa has pursued since the demise of colonialism has created new frontiers that have enhanced the nature, rate, and extent of industrialization and investment on the continent. Whilst this drive for development at all costs has widened opportunities for socio-economic development on the African continent, it has become difficult if not impossible to ignore the adverse consequences on communities' access to land, land tenure and security and the enjoyment and exercise by communities of land-related rights. Indeed, this industrial development trajectory has pushed these critical issues to the backseat. Importantly, land-based communities are in a conundrum to either accept the new economic system that subordinates their community rights to land or reject and resist at their own peril.

In Africa, the land is the fabric upon which most rural communities depend on for their livelihoods. Ownership, access, and use over land is now under immense threat as a result of developmental projects that are in most instances undertaken in rural areas. Zimbabwe is no exception to this growing developmental trend. The new demand for land is driven by both foreign and local investors who seek land for agricultural, mining and construction projects.[1] Largely, the establishment of these developmental projects is perceived as being associated with positive benefits to host communities and the nation at large. For instance, host communities expect enhanced employment creation, improved service delivery and increased income generating opportunities.[2] Industrialization as a result of large-scale development projects enables governments to derive macro-level benefits such as improved sectoral contributions to the Gross Domestic Product (GDP) and increased government revenue.[3] Various other positives can also be listed from a socio-economic, environmental and macroeconomic perspective.

Despite these benefits, the negative social and potential human rights impact of the developmental projects are rarely mentioned.[4] Increasingly, scholars have begun to highlight the nature and extent of human rights violations experienced by communities

[1] JM Wadyajena 'Report of The Portfolio Committee on Youth, Indigenization and Economic Empowerment on The Green Fuel Chisumbanje Ethanol Project- Second Session of the Eight Parliament' *Parliament of Zimbabwe* (2015).
[2] L Cotula…et al. 'Land Grab or Development Opportunity? Agriculture Investments and International Land deals in Africa' *International Institute for Environment and Development (IIED)* (2009).
[3] K Deininger 'Challenges Posed by the New Wave of Farmland Investment'*, Journal of Peasant Studies* 38 (2) (2011) 217-247.
[4] A Zoomers 'Globalisation and the Foreignisation of Space: Seven Processes Driving the Current Global Land Grab'. *Journal of Peasant Studies* 37(2) (2010) 429-447.

relocated as a result of developmental projects.[5] Indeed, some studies have demonstrated that the quality of life decreases after the onset of massive industrial projects that compels relocation of communities off their lands.[6] The establishment of these developmental projects alters, in a fundamental manner, the lives of local communities residing on communal land. For instance, the development projects are said to negatively affect livelihoods of communities that reside in communal land. In most instances, host communities are involuntarily relocated from their ancestral lands to pave way for the developmental projects.[7]

1.2 Background

Since the turn of the 21st Century, the Zimbabwean government has been on an overdrive trying to lure Foreign Direct Investment (FDI). These efforts have culminated in an increase in the number of investment agreements that have been signed between the Zimbabwean government and various corporates from many emerging and industrialized nations. The majority of these agreements are targeting sectors such as the energy, mining and agricultural sectors, among others.[8] Investment agreements in these areas follow what is largely known as the 'Triple-F crisis' in the world which is Food, Fuel, and Finance.[9] The Triple F crisis has resulted in increased interest to open up land, minerals and other investment opportunities to investors by the Zimbabwean government.[10] The increased opening up of land to development projects in these three sectors has led to an upsurge in the relocation of communities, loss of customary land rights and general anxiety in other communities without the investment footprint.

The establishment of development projects in communal areas is ranked as the second largest category that leads to relocations worldwide after disaster-induced relocations.[11] Communities are largely relocated to a different residential community with little or no consideration of their Environmental, Economic, Social and Cultural Rights (EESCRs) as

[5] C Gunduz Human Rights and Development: The World Bank's Need for a Consistent Approach *Development Studies Institute* (2004).
[6] B Musonda The Impact of The Gwembe Tonga Development Project on The Gwembe People (unpublished Master's thesis: University of the Witwatersrand: 2008).
[7] Food and Agriculture Organisation of the United Nations 'Compulsory Acquisition of Land and Compensation' (2009) available at http://www.fao.org/3/a-i0506e.pdf (Accessed: 10 May 2017).
[8] Zimbabwe Investment Authority 'Invest in Zimbabwe Handbook' (2017).
[9] R Hall and G Paradza 'Foxes Guarding the Hen-house: The Fragmentation of 'The State' in Negotiations over Land Deals in Congo and Mozambique" (2012) available at http://commons.wikimedia.org/wiki/File:Manicaland_districts.png (Accessed: 26 May 2017).
[10] R Ndamba & LT Chisaira 'Responsible Investment in the Natural Resources Sector: An Analytical Profile of the Mining Sector in Zimbabwe' *Zimbabwe Environmental Law Association* (2016).
[11] A Bilak… et al 'Global Report on Internal Displacement' International Displacement Monitoring Centre (2016).

enshrined in the Constitution of Zimbabwe.[12] The World Bank recognizes that relocations as a result of developmental projects, [13]

> if unmitigated, often gives rise to severe economic, social and environmental risks: productive systems are dismantled; people face impoverishment when their productive assets or income sources are lost; people are relocated to environments where their productive skills may be less applicable and the competition for resources greater; community institutions and social networks are weakened; kin groups are dispersed; and cultural identity, traditional authority, and the potential for mutual help are diminished or lost.

In Zimbabwe, there is ample historical and contemporary evidence that development projects have not benefited host communities. For instance, from1957 to1958, it is estimated that 57 000 Gwebe Tonga community who used to reside on the banks of the Zambezi River were relocated to adjoining Binga District uplands so as to make way for the construction of a Kariba hydro-electric dam.[14] To date, these communities are amongst the poorest and reside in the most remote area in Zimbabwe with a poverty prevalence rate of 88.3 percent.[15]

Another important example relates to mining investments in Marange in Manicaland Province where some communities were relocated to Arda Transau, which lies approximately 106km from their original homesteads.[16] This recipient area lacks basic communal amenities such as safe, clean and potable water and space for housing expansion.[17] The relocated communities were given 3 roomed houses per household and tapped water which they pay about $8 per month.[18] However, this new reality is different from what the communities were used to. The Green Fuel Ethanol project in Chisumbanje area is yet another example in which local communities suffered heavily from loss of land.[19] The construction of the Tokwe Mukosi Dam in Masvingo Province has also resulted in downstream flooding that displaced thousands of families. These families were

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[12] Constitution of Zimbabwe Amendment (No.20) Act 2013 (*hereafter the Constitution*).
[13] Operational Policy 4.12 of the World Bank (2011) available at https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f8a4f.pdf (Accessed: 2 November 2016).
[14] T Mashingaidze Beyond the Kariba Dam Induced Displacements: The Zimbabwean Tonga's Struggles for Restitution, 1990s–2000s' *International Journal on Minority and Group Rights* 20 (2013) 381–404.
[15] Zimbabwe National Statistics Agency *The Zimbabwe Poverty Atlas: 2015* available at https://www.unicef.org/zimbabwe/Zimbabwe_Poverty_Atlas_2015.pdf (Accessed: 22 September 2017).
[16] C Madebwe… et al. 'Involuntary Displacement and Resettlement to make way for Diamond Mining: The Case of Chiadzwa Villagers in Marange, Zimbabwe' *Journal of Research in Peace, Gender and Development* 1(10) (2011) 292-301.
[17] D Shumba 'Report of The Portfolio Committee on Mines And Energy On The Consolidation Of The Diamond Mining Companies, Fourth Session of Eighth Parliament (2017).
[18] Ibid.
[19] P Mutopo 'Impacts of Large-Scale Land Deals on Rural Women Farmers in Africa' *Open Society Initiative for Southern Africa* (2015).

made destitute and were temporarily sheltered in camps.[20] The emerging trend from the literature is that, in most instances, development projects ignore the plight of host communities. Further, development projects put aside the land rights of poor host communities against the governmental interest in national development or the financial interests of multinational corporates.[21]

The current model of investment for large-scale investments in Zimbabwe is very different from the previous model in that the majority of the investments projects were mainly undertaken by international companies with limited governmental intervention.[22] Indeed, the contemporary nature of development is driven by international companies with the full support, facilitation, and backing of the benefiting and host state. Thus, most large-scale investment agreements are joint venture agreements bringing together the government, private business and foreign government-related companies, to constitute what is known as Public-Private Businesses (PPBs). However, increased government involvement has raised questions of whether the government would be able to render its duties impartially where national laws and policies are violated by their investment partners especially when it comes to relocation from the communal land.

The alliance of the state and multinational companies suggests that communities are most likely to fight a losing battle. Further, multinational companies that are involved in developmental projects in Zimbabwe have a superior financial power compared to that of host communities. This has made it difficult for host communities to legally hold these companies to account. The complicity of government has been more evident in the laws they have made to facilitate the operations of these multinationals. For instance, under the banner of "Ease of doing Business", the government removed legal and technical obstacles that can speed up operationalization of these multinationals. In reality, this has resulted in the disenfranchisement of host communities' land rights.

Against this background, this research seeks to unpack the various pieces of legislation and policies in Zimbabwe that have a direct or indirect bearing on the relocation of communities because of developmental projects. Some of the laws that are applicable and have implications for the relocation of communities include the Mines and Minerals Act,[23] the Rural District Councils Act,[24] Traditional Leaders Act,[25] Environmental

[20] Zimbabwe Human Rights Commission 'Report on the Mission Visit to Chingwizi conducted from the 19th to the 22nd of August 2014' available at http://www.zhrc.org.zw/download/chingwizi-report-19-august-2014/ (Accessed: 11 June 2017).
[21] Ibid.
[22] O De Schutter 'Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge' *United Nations General Assembly* (2009).
[23] Chapter 21:05.
[24] Chapter 29:13.
[25] Chapter 29:17.

Management Act,[26] the Communal Land Act,[27] Land Acquisition Act,[28] Agricultural Land Settlement Act,[29] Rural Land Act,[30] and the Land Commissions Bill.[31]

While relocation of communities may be inevitable, this paper argues that such actions should take into account constitutional provisions, regional and international best practice. The Constitution provides for the consideration of international law and principles in the interpretation of the Declaration of Rights to which Zimbabwe is a party.[32] Reference will also be made to how South Africa has sought to address the growing challenge of community's land tenure rights in the wake of increased developmental projects. The various international guidelines and principles that can aid in strengthening the land rights of communities including the United Nations' Basic Principles and Guidelines on Development-Based Evictions and Displacement;[33] and the African Union Convention For The Protection And Assistance Of Internally Displaced Persons In Africa.[34] These principles and guidelines are important sources upon which Zimbabwe can draw lessons in instances that developmental projects are to be established and resultantly leading to relocations. All in all, it is important to ensure that the establishment of developmental and subsequent relocation should as a matter of principle lead to the improvement of livelihoods of the affected people as opposed to impoverishment.[35]

1.3 Objective and Research Questions

The objective of this research is to assess the current legal position governing community land rights in the context of developmental projects in Zimbabwe. The law provides various rights and obligations that are meant to be enjoyed and observed by all the citizens, all organs and agencies of the state, and all state institutions.[36] Most of the laws that govern and regulate developmental projects in Zimbabwe make provisions for communities to safeguard their rights against abusive corporate entities. However, there is a tendency by the government to partially observe the law by facilitating the operationalization of developmental projects when the interests of communities are at

[26] Chapter 20:27.
[27] Chapter 20:04.
[28] Chapter 20:10.
[29] Chapter 20:01.
[30] Chapter 20:18.
[31] H.B. 2, 2016.
[32] The Constitution (See note 12: Section 46).
[33] United Nations 'Basic Principles and Guidelines on Development-Based Evictions and Displacement' available at http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf (Accessed: 24 May 2017).
[34] African Union Convention For The Protection And Assistance Of Internally Displaced Persons In Africa (*Hereafter the Kampala Convention*) available at https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa (Accessed: 19 May 2017).
[35] FAO (See note 7).
[36] The Constitution (See note 12: Section 2).

stake. Further, it has been noted that host communities are not able to use and enforce their legal rights unless they have the information, the knowledge and the capacity to do so in legal terms.[37] An understanding of the current laws and policies that govern large-scale investments is therefore imperative if the rights of host communities are to be sufficiently protected and promoted in the face of developmental projects being established on 'their' lands.

Against this background, this study seeks to address the following research questions:

(i) What is the nature of communal land tenure system in Zimbabwe?
(ii) What are the laws, policies, institutions, and practices regulating relocations induced by large-scale investments in Zimbabwe?
(iii) To what extent does Zimbabwe's legal and policy framework regulating relocations induced by large-scale investments compare in light of regional and international frameworks?
(iv) Are there any international best practices and/or lessons that can be learned in order to improve Zimbabwe's legal and policy frameworks regulating displacements relocations induced by large-scale investments?

1.4 Conceptual Framework

Given that the research seeks to understand the impact of developmental projects on the Environmental, Economic, Social, Cultural Rights (EESCRs) of communities because of a weak land tenure system, the human security approach was adopted. The human security approach understands that there are various threats to human wellbeing and or development.[38] This approach was adopted because human rights and individual freedoms are an important facet towards the realisation of positive developmental outcomes.

The human security approach identifies seven main securities. These are; (i) economic security (an assured basic livelihood derived from work, public and environmental resources, or reliable social safety nets); (ii) food security (physical and economic access to basic food); (iii) health security (access to personal healthcare and protective public health regimens), (iv) environmental security (safety from natural disasters and resource scarcity attendant upon environmental degradation); (v) personal security (physical safety from violent conflict, human rights abuses, domestic violence, crime, child abuse); (vi) community security (safety from oppressive community practices and from ethnic

[37] FAO (See note 7).
[38] S Fukuda-Parr and C Messineo 'Human Security: A Critical Review of the Literature' *Centre for Research on Peace and Development* (2012).

conflict); (vii) political security (freedom from state oppression and abuses of human rights).[39]

The research, however, took cognizant of the delimitation of the human security conceptual framework considering the multi-dimensional impacts of developmental projects and resettlement. The establishment of development projects on communal land often does not just result in a loss of shelter but also results in loss of livelihood or economic opportunity, loss of community rights to land and increasing vulnerabilities in terms of access to social services such as water, sanitation and education.[40] It is as such that cultural security and gender security were combined in the analysis. People should be able to exercise their choices freely and confidently given the fact that opportunities they have today will not be lost tomorrow.[41]

1.5 Research Methodology

To address the objectives of this research, the researcher conducted a desktop study. This research relies on a combination of primary and secondary sources of data from local, regional and international jurisprudence related to land rights. Primary literature that was used in the study included the Constitution, legislation and case law. The research also drew insights from secondary data sources in the form of books, journal articles, research papers, thesis and conference papers. These sources of information were of vital importance in providing an understanding of the prevailing circumstances and views other parties have on the topic of communal land rights and relocation in the dawn of developmental projects in Zimbabwe.

1.6 Overview of Substantive Chapters

This research is divided into five chapters, including this introductory chapter. This chapter provides understanding background to the research problem and its objectives and research questions.

Chapter Two gives a detailed overview of the historical context of land ownership and the various land tenure systems existing in Zimbabwe. The chapter seeks to locate the current challenges of communal land rights in Zimbabwe within the historical context. Further, the chapter identifies the various challenges that the prevailing land tenure highlights with regards to the need for reforms particularly for communities residing on communal land.

Chapter Three highlights the general legislation that has a bearing on communal land tenure rights in Zimbabwe. The chapter also discusses the specific land tenure legislation

[39] United Nations Development Program *The Human Development Report* (1994).
[40] Ibid.
[41] Ibid.

in Zimbabwe. This is followed by a discussion and evaluation of the constitutional framework governing land tenure and related rights in Zimbabwe's Constitution.

In Chapter Four, the regional and international frameworks which Zimbabwe can draw important lessons on strengthening community land rights are discussed. Regional and international law instruments discussed in the chapter give an indication of how Zimbabwe can promote the rights of residents on communal land whilst simultaneously improving their tenure security.

Chapter Five summaries provide recommendations aimed at strengthening community land rights in the wake of developmental projects in mining, agriculture and infrastructure sectors and how to enhance community responses in such cases.

CHAPTER TWO: NATURE OF LAND TENURE SYSTEMS IN ZIMBABWE

2.1 Introduction

Chapter one discussed the basis and model of developmental projects being established in Zimbabwe with governments support and the resultant impacts on the rights of communal land residents. The chapter highlighted the need to view impacts of developmental projects holistically through the human security approach. In most instances, rural community residents have had to be relocated to different residential areas which makes it impossible to derive the project benefits.[42] The objective of this chapter is to locate the establishment of developmental projects within the communal land tenure system in Zimbabwe. The chapter identifies the advantages and challenges that various tenure systems provide to the holder of the title as it relates to developmental projects.

2.2 Communal Land Tenure and Security

Land tenure and tenure security are terms that have been widely used interchangeably yet they are very distinct. Tenure over immovable or movable resources attached to land is a topical and emotive topic to rural communities in Zimbabwe in the wake of increased developmental projects.[43] This is because rural communities are usually the ones left worse off once the projects are established. Given this emotional topic to the rural communities' lives, it is important to understand land tenure and resultant tenure security in Zimbabwe.

Land tenure can broadly be defined as the system and institutions governing who owns the land, has access to use the land and control of the land.[44] Hall, on the other hand, defines land tenure as terms and conditions regulating how land is held, transacted and used.[45] Shivji alternatively defines land tenure as legally recognized rules governing land ownership, land rights allocation, substantive content, protection, disposal and/or extinction and regulation.[46] Rihoy, on the other hand, defines tenure as the exclusive control one has over land resources and natural resources underneath the land either as an individual or a group.[47] The common feature of land tenure definitions provided by the

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[42] A Darimani 'Alternative Investment Framework for Africa's Extractive Sector: A Perspective of Civil Society' *CCIC Conference on Development, Investment and Extractive Sector* (2009).
[43] T Murombo 'Community-Based Natural Resource Management and Community Based Property Rights in Land Reform Law: Zimbabwe Case' In *IASCP Ninth Biennial Conference: The Commons in an Age of Globalization* (2002).
[44] DC Miller and A Pope *Land Title in South Africa* (2000) 456.
[45] R Hall 'Evaluating Land and Agrarian Reform in South Africa: Farm Tenure' *Programme for Land and Agrarian Studies Occasional Paper* 3 (2003) 1-42.
[46] IG Shivji… et al *National Land Policy Framework* (1998).
[47] L Rihoy… et al. 'Tenure in Transition. A Stakeholders Guide to Natural Resources in Africa *Community Based Natural Resources Management* (1999).

various scholars is that land tenure provides the person or the entity whom the rights are vested with certain powers and privileges. Consequently, the person or entity whom land tenure is vested can determine the manner of how benefits derived from exploiting such a resource should be undertaken. It is in such light that land tenure is the most secure form of ownership that gives one the power of eminent domain over both movable and immovable resources associated with that right within the confines of the law.[48] The most important precept of land tenure is that it must be founded in the law which can arguably be customary or statutory law. On this basis, land tenure in this research will be discussed in the context of customary or statutory recognition of how people relate to land and rights provided for with such land tenure.

Land tenure security, on the other hand, relates to how other people or the state respect the quantum of rights intricately linked with land tenure.[49] The opposite of tenure security is tenure insecurity which according to Mutangadura results in landholders risking losing their interests in land.[50] Land tenure and security are therefore correlated as land tenure offers various rights to the owner to which others have to respect for tenure security to exist.

The foundation of existing land tenure rights in Zimbabwe is within Germanic and Roman-Dutch law that provides the owner with use, transfer, exclusion and enforcement rights. Rukuni identifies similar rights which he sees as key to promoting the security of tenure.[51] Use rights give the owner of such right the power to grow crops, trees, establish structures, and derives economic benefits from the use of such land. In tandem with the use right is the right to transfer such rights. Transfer of the rights permits the owner to sell, mortgage, hypothecate or rent the land in question. Thirdly, the owner of land tenure rights has exclusionary rights. Exclusionary rights give the holder the power and the mandate to exclude all other persons from enjoying all other benefits that the land tenure rights bring forth. Lastly, the holder of land tenure rights has enforcement rights. This is the power to apply legal, institutional and administrative provisions in the law that recognize these rights.[52]

In light of what has been discussed in relation to the quantum of land rights derived from the Roman-Dutch law, communal land rights under the African tradition/custom provides

[48] J Pienaar and A Kamkuemah 'Farm Land and Tenure Security: New Policy and Legislative Developments In S Liebenberg and G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012).
[49] A Mahomed *Understanding land tenure law: Commentary and Legislation* (2009) 28.
[50] G Mutangadura 'The incidence of Land Tenure Insecurity in Southern Africa: Policy Implications for Sustaining Development' *Natural Resources Forum* 31 (2007) 176-187.
[51] M Rukuni and CK Eicher *Zimbabwe's Agricultural Revolution* (1994).
[52] PB Matondi and M Dekker 'Land Rights and Tenure Security in Zimbabwe's Post Fast Track Land Reform Programme' *Ruzivo Trust* (2011).

similar rights.[53] Firstly, the communal land is deemed to be 'owned' by the community as a whole and at various levels. For example, one gets land rights through the household, the household has rights within the kinships which also connects to the local communities. Secondly, communal land rights are inclusive as opposed to being exclusive in character. The inclusive nature of communal land rights, therefore, offers various use rights for residential, agriculture, pasture, forests and water uses. Thirdly, communal land rights are transferable only within the social fabric by birth, affiliation or allegiance to the local traditional structure. Fourthly, the exclusive rights to communal land are different to ownership as this can only be done through the authority and administration systems. Lastly, the enforcement mechanisms are largely concerned with ensuring that everyone has access to the common property, distribution and dispute resolution.[54]

It is this understanding that disagreements between scholars exist on whether customary land tenure rights should be formalized or codified within the ambit of Zimbabwe's private property rights, 'the edifice'.[55] Arguments for formal codification see this as the only mechanisms upon which security of tenure can be guaranteed as it removes the characteristic between individual and collective rights.[56] However, this argument is countered strongly by some African property rights scholars who argue that codification and formalization is not a solution without the proper contextual understanding of interests within land tenure and the insecurity that may arise to the same people codification seeks to protect.[57] It is in such light that this research takes a look back at the historical context of land tenure to understand better which mechanisms will better provide for respect and protection of the various land rights discussed above.

2.3 Historical context of customary land ownership in Zimbabwe

Zimbabwe's history highlights that communal land was securely provided for under customary law before colonization through various leadership structures.[58] The leadership structures in place were the ones that addressed issues of land use, transfer, exclusion and enforceability in accordance with the traditional context of the day. The communal land was not individually owned but was owned by the community in question.

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[53] HWO Okoth-Ogendo 'Some Issues of Theory in the Study of Tenure Relations in African Agriculture' *African Journal of the International African Institute* 59 (1) (1989) 6-17.
[54] Ibid.
[55] R Kingwill… et al 'Conclusion: Beyond 'the Edifice' In D Hornby, l Royston R Kingwill and B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 392. The edifice is used as a metaphor to describe the formal system of laws, institutions, practices and professions that regulate the registration of property rights.
[56] M Tehan 'Customary Tenure, Communal Titles and Sustainability' in L Godden & M Tehan (eds) *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (2010) 355.
[57] A Pope 'Indigenous-Law Land Rights: Constitutional Imperatives and Proprietary Paradoxes' *Acta Juridica* 1 (2011) 308 – 333.
[58] PB Matondi (See note 52).

The settler-colonial system, however, changed all these existing structures by promoting land dispossession and class agrarian inequalities based on individual land title ownership that regarded customary land structure as inferior.[59] A new hierarchical structure was created which saw 'ownership' rights being elevated to the topmost level of all other rights. Other rights such as servitudes were derogated to become 'limited real rights' followed by personal rights (derived from contractual arrangements) and at the very bottom being statutory use and permit rights regarded as the least secure form of rights.[60] Effectively, African customary land tenure system and the law that existed was eroded with the adoption of Roman-Dutch Law as the priority law governing land tenure in Zimbabwe.[61] Roman-Dutch Law advances private tenure rights as the most appropriate system that could protect one's interests. Zimbabwe, therefore, inherited a dual land ownership system at independence where communal land tenure systems were weak and insecure.[62] After independence, Zimbabwe's land tenure system has largely remained the same. This has adversely impacted on black Zimbabweans residing on communal land as the current law advances and recognizes individual land title ownership.

The various types of land tenure systems that were inherited at independence in 1980 by the government of Zimbabwe include:

2.3.1 Land under Freehold Tenure

Freehold land tenure is arguably the most secure land tenure system in the world as it is reflected through a title deed given to a natural or juristic persona.[63] It recognizes private tenure which allows the holder of such a right the ability to enforce it against both the state and individuals in situations that one interferes with the enjoyment of such right. The rights under freehold tenure can, therefore, be freely tradable on the market as one can sell, buy or transfer the right to another person within the land registration process. The market system effectively is in favour of this tenure system as it can be traded on the market in instances that the right holder provides it as collateral security. The other recognized benefit of this tenure system is the minimal interference from any other entity in land administration and supported by the judiciary recognition of private property rights. However, in African constitutional democracies, freehold tenure security is not absolute. This is because the Constitutions provide for the compulsory acquisition of such land by

[59] S Moyo *Land Reform and Redistribution in Zimbabwe since 1980* (2013).
[60] A van der Walt 'Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa' *Koers* 64 (2 & 3) (1999) 259-294.
[61] PB Matondi (See note 52).
[62] Ibid.
[63] Freehold land tenure needs to strictly conform to the cadaster, financial, spatial planning and land use management systems.

the state with the *proviso* that due process is followed whereupon compensation should be paid to the title holder.

In Zimbabwe, with the advent of the land reform program, the government made huge inroads into the freehold land tenure system especially with regards to the acquisition of agricultural land.[64] It has been argued that since 2000, it has been those with freehold tenure that have been the least secure, and those with communal tenure who have been the most secure.[65] What the above position means is that no tenure system, whether freehold land tenure which is considered as the most secure is absolute. All land tenure systems have limitations and these limitations can be a result of legal changes or political developments. For example, the Constitution of Zimbabwe provides for the compulsory acquisition of property including land for agricultural purposes but such acquisition has to be done within the confines of the law.[66] It can be argued that persons who enjoy freehold tenure have a better chance of protecting their land rights than those without. The reason for this is simple; private ownership rights enjoy the best legal protection by both the law and the state, and the state cannot easily interfere with such rights without creating a real social crisis.

Finally, it is asserted that freehold tenure system is not common in Zimbabwe's communal areas, especially those that are affected by large-scale developmental projects. Where such developmental projects threaten privately owned land, the large-scale investments involved have found it rather difficult to compel the relocation of the private landholders.[67]

[64] The Constitution: (See note 12: Section 72 (1)). Agricultural land is defined as land used or suitable for agriculture, horticulture, viticulture, forestry or aquaculture or for any purpose of husbandry, including keeping or breeding of livestock, game, poultry, animals or bees; or the grazing of livestock or game; but does not include *Communal Land [own emphasis].*

[65] I Scoones 'Livelihoods after Land Reform Programme' (2009) available at https://www.ids.ac.uk/files/dmfile/TenuredilemmasforZimbabwe.pdf (Accessed: 15 August 2017).

[66] The Constitution: (See note 12: Section 71 (3)).

[67] L Cotula (See note 2).

2.3.2 Customary Tenure

The law recognizes customary tenure as a separate tenure system that operates in Zimbabwe. This tenure system is inaccurately identified and referred to as communal land tenure system because of reference under the Communal Land Act. Customary land tenure is one in which land rights are determined as per customary law. The customary law, therefore, determines the parties who may have access and content of the rights that an occupant of the land is given. In accordance with Zimbabwe's customary law, one has the use, access and management rights over the customary land. Therefore, one can enjoy perpetual benefits over the land in question subject to limitations of the rights that are associated with this type of land tenure system. The ultimate land ownership is vested in the state. Nevertheless, this type of land tenure is not secure as it does not relate to the private individual in question but social construction of the community involved. Furthermore, the land is not recognized in the market system for transaction purposes. Effectively, the value that is attributed to the individual is in respect to the personal improvements made on the land given the personal nature of the right.

Most importantly, persons who hold title under customary land tenure system are helpless if the government decides to give private investors developmental rights over that land. As such, customary land tenure makes the state a reversionary owner of the land. This means that the state can do what it wishes with its land. In Zimbabwe, communities that rely on the customary land tenure system have faced the biggest challenges relating to forced relocation, inadequate compensation and disruption of livelihoods in order pave to way for developmental projects.[68] In such circumstances, the adverse effects of the partnership between the state and multinational foreign investors are manifested. Once the state decides to give authorizations for private investments to carry out developmental projects, the customary land tenure system abjectly fails to offer protection to customary landholders.

2.3.3 Statutory Tenure or State Land

Another form of land system that was inherited at independence is statutory tenure or state land. This type of land tenure refers to land that is held by the state including the various state bodies created by statutes. Examples of state land tenure include land that is under national parks, national forests land and game reserves. This type of tenure system cannot be privately owned but is given to the state to administer for the benefit of all citizens to enjoy such resources. It could be argued that since this is state land, there

[68] Examples include communities from Marange, Chisumbanje, the Gwembe Tonga during Kariba dam construction and those that resided around the Tokwe Mukosi dam.

are no obstacles for the state to do as it wishes. What the state needs to do is simply to comply with the relevant laws. Thus, the state can parcel out such land for purposes of developmental projects. Various instances exist where mining companies have licenses and permits to carry out activities in game parks or other amenities where the title was state title.[69] Communities that exist in proximity to these areas have little recourse from a state that can pass and/or amend laws to have its way.

2.3.4 Land under Leasehold Tenure

In Zimbabwe, one can 'own' land through a lease system that is given to him by the owner of the land in question. The owner can either be a private individual or the state. The Agricultural Land Settlement Act[70] provides room for one to hold land under leases which are given by the state. This land tenure system's unique feature is that it is based on a contractual arrangement between the lessee and the lessor for a defined time period with or without the option to buy. The benefits associated with this type of land system is that it allows the lessee to use the lease as collateral for the value of improvements on the property. The usufruct rights and the lease can regulate issues such as inheritance or the courts can be used to interpret such clauses. However, there are various demerits that are associated with this tenure system. The main drawback of this tenure system is the non-transferability of the right. The right over the property rests with the owner of the land in question with the only rights that the lessee enjoys being usufruct rights. The lessee cannot use the lease as a collateral.

Resultantly, the Zimbabwe government has over the years had to address the issues of land ownership whilst simultaneously evolving the tenure systems in response to the general demands which required promotion of political and socio-economic rights.[71] In the year 2000, the government of Zimbabwe introduced the Fast Track Land Reform Programme (FTLRP) that was meant to be redistributive of land in Zimbabwe.[72] The FTLRP sought amongst other objectives to broaden access to land and address tenure insecurity amongst some indigenous Zimbabweans. The attainment of various socio-economic rights that Zimbabwe sought to achieve over the years since independence has therefore created various land tenure systems regulating the various context or areas that communities reside. The fifth category of land tenure system emerged in the form of resettlement area or permit system with three resettlement models largely flowing from

[69] Wild Zambezi 'Mining threat in Mana Pools causes outrage' available at http://www.wildzambezi.com/articles/2012/08/14/mining-threat-in-mana-pools-causes-outrage (Accessed: 14 September 2017).
[70] Agricultural Land Settlement Act (see note 29).
[71] T Cousins… et al *Perspectives on Land Tenure Security in Rural and Urban SA: An analysis of the Tenure Context and a Problem Statement for Leap* (2005).
[72] S Moyo (See note 59).

the FTLRP established by the Land Acquisition Act.[73] This land tenure system eroded the largely prevailing freehold and private tenure systems with state property distributed by the government through statutory and permissory tenure.[74] These sub-species of land tenure systems need brief discussion.

I. Model A Scheme,

The Model A scheme was given to communities in former freehold title tenure that was largely held by commercial white farmers. The scheme effectively gives the occupants rights similar to those that are applicable under customary tenure as they can erect residential accommodation, engage in pasture activities and engage in arable farming on 5 hectares of land.

II. Model B Scheme,

Model B scheme is still a permit type of land tenure that was given to occupants on large-scale farms with 99 year and 25-year lease arrangements. The provision of longer lease periods to occupants such as the 99-year leases was to address the market concerns to the time that such occupants would be resident on the land in question. The provision of the long terms leases is also in line with section 65 of the Deeds Registries Act.[75] The Act provides room upon which long-term leases can be registered in the Deeds Registry. This provision provides the owner of the land and the creditor security that the obligations would be met.

III. Model C Scheme,

The third resettlement permit system that was created as a result of the FTLRP was a Model C Scheme. This model was designed to decongest the land pressure that existed under customary land whilst maintaining similar attributes to customary land tenure. Under this model, the state retains regulation power over allocation of land. Further, the state is the adjudicator and administrator through the offer letter given to the occupants of the land. The offer letter clearly highlights terms upon which the right to occupancy can be withdrawn.[76] This model is arguably the most insecure of the three models created from the FTLP.

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[73] Land Acquisition Act (see note 28).
[74] S Moyo *A Review of Zimbabwean Agricultural Sector following the Implementation of the Land Reform Overall Impacts of Fast Track Land Reform Programme* (2004).
[75] Chapter 20.05.
[76] Zimbabwe Institute '*Zimbabwe Land Policy Study'* available at http://www.zimbabweinstitute.net/File_Uploads/docs/ZI_Land_Policy.pdf (Accessed: 15 June 2017).

The three models of land tenure that were created under the FTLP all fall under the general ambit of a permit tenure regime. This type of tenure system is one in which the government gives various permits to landholders depending on the model to which one would fall under in the resettlement areas. The three models are similar to the customary land tenure in that the owners have the benefits of perpetual residence and inheritance issues have to be determined by the court process. Further, this permit tenure system is generally insecure as further amplified by the political nature and system that created such rights.[77] The financial markets have not been open to accepting the permits as collateral to the right holder. This renders the permits to be of less value in the financial market.

Overall, the FTLRP addressed the historical imbalances of the colonial land rights system that advanced private property rights over and above customary communal land rights. The move towards state land user rights was the best means to ensure that land would not be returned to the previous white commercial farmers.[78] However, these land user rights are constantly under scrutiny largely because of lack of understanding on their scope, security and transferability when compared to freehold tenure that provides tradable lessees and land rental markets.[79]

Despite the state having been responsive to the political, socio-economic needs of the populace through evolving the land tenure system in existence, the state still retains control over the new land tenure rights. Unfortunately, this has not translated to stability and trust from farmers, business community and the government and in others who are affected by land utilization. [80] The instability has been partially attributed to the constant changes in government policies, legislation and political position with regards to land ownership from the FTLRP. [81] Further, the exclusionary clause of the judiciary in section 72 of Constitution of Zimbabwe makes occupants hesitant to make significant infrastructural investments on such land given past experiences. Legal security of tenure of this new land tenure system is imperative if at all trust of the various stakeholder is to be attained. [82]

2.4 General Overview of Zimbabwe's Land Tenure System

It is clear that Zimbabwe has various formal and informal land tenure systems that offer different levels of legal protection to rights holders under each system, in particular, against aggressive developmental trajectories of the modern era. Further, the land tenure

[77] Ibid.
[78] S Moyo (See note 74).
[79] Ibid.
[80] Zimbabwe Institute (See note 76: 11).
[81] S Moyo (See note 74: 47).
[82] PB Matondi (See note 52:37).

system has evolved with time and continues to evolve as the nation's socio-economic and political features evolve. However, for this evolution to be a welcome development, the land tenure systems cannot stagnate in view of contemporary developments that directly and indirectly impact on their integrity, utility and relevance to society. Land tenure with security is an important aspect of human security, and without such, communities live with constant threat of eviction, relocation, translocation, forced ejection or other challenges that are associated with insecurity of tenure.

More importantly, there is no doubt that the land tenure systems that exist in Zimbabwe have a huge impact on the extent to which communities can protect their land rights against the adverse effects of aggressive economic development. The land tenure system has a twofold effect on communities that is: it can either enhance communities' public participation or galvanize their resistance to the adverse consequences of developmental projects such as forced relocation. Weak land tenure systems do not guarantee communities of that strength against the mighty of developmental investments that come with the full support of the government.

Finally, the nature in which land tenure systems have been formulated and evolved seems to have little regard to the threats posed to communities by developmental projects. It also seems like there were no deliberate attempts to consider economic development in the formulation of land tenure systems, yet the greatest challenge to tenure systems in the twenty-first century has been contemporary economic development models. Thus, when conflicts and tensions arise between communities and large-scale developmental project investors, the real fault lines cannot be confronted. Ensuring that the existing land tenure systems anticipate the challenge posed by developmental projects, need for accommodation between the two different systems should be addressed.

2.5 Conclusion

The purpose of this chapter was to provide a historical overview which is imperative to understanding the tenure systems that exist in Zimbabwe towards recommending a system that can better protect communities in the wake of development projects. This chapter indicated the pros and cos that are associated with the various land tenure systems that exist in Zimbabwe. The chapter highlighted that customary tenure was a great means of regulating and tenure in the previous world economic system. The discussions in this chapter clearly tracked the various land tenure systems that exist in Zimbabwe. Customary land tenure long existed before colonialism and was the best means of tenure applicable at that time. Colonialism elevated private tenure as the best and superior system of land tenure, a position that now exists globally. This position has

remained unchanged even after independence. This is despite the fact that a new tenure system was created after independence in the form of permit tenure system.

The next chapter discusses the laws and policies in the context of the various tenure systems discussed in the current chapter. Special attention will be paid to the customary land tenure system as it relates to developmental projects. Further, the next chapter will identify the gaps and weakness in these laws and policies as they relate to the constitutional provisions.

CHAPTER THREE: LEGAL FRAMEWORK ON CUSTOMARY LAND TENURE IN ZIMBABWE

3.1 Introduction

Chapter Two highlighted the various land tenure systems and rights given to the landholders. The most common land tenure system that is relevant to rural communities who are largely impacted by developmental projects is the customary land tenure system. This chapter considers the various laws and policies that have a direct and indirect bearing on customary land tenure system. The current chapter is arranged as follows; section one, a review of the various laws currently in place indirectly seeking to strengthen customary tenure rights of communities; section two provides analysis of the specific laws regulating community land tenure system and section three focuses on the constitutional provisions that have a bearing on strengthening customary land tenure given that it is the highest law in the land to which all preceding laws must conform.

3.2 The Legal Framework

Zimbabwe has several pieces of legislation that have an indirect bearing on customary land tenure. Communities can rely upon these legislations to advance a more secure land tenure system and ensure that developmental projects do not leave them worse off. These laws are applicable to all persons, be it natural nor juristic, private or state. As such, it is imperative for investors to follow the due legal process in addressing all the issues, tensions and conflicts that emanate from a developmental process. These laws include the Rural District Councils Act,[83] Traditional Leaders Act,[84] Mines and Minerals Act[85] and the Environmental Management Act.[86] The various provisions that have a bearing on customary land tenure will be identified. Further, the challenges that are likely to be faced by communities to ensure the realization of the legislative and constitutional aspirations are also discussed. These pieces of legislation are indirectly imperative in the advancement of a more secure customary land tenure system in Zimbabwe which has been characterized as weak.

3.2.1 Rural District Councils Act

The Rural District Councils Act[87] is one of the most important statutes in as far as promoting customary land tenure security in Zimbabwe is concerned. The Act was created to specify the various duties that are expected of Rural District Councils (RDCs) and any other matters that are connected or incidental to them fulfilling the set mandate

[83] Rural District Councils Act (see note 24).
[84] Traditional Leaders Act (see note 25).
[85] Mines and Minerals Act (see note 23).
[86] Environmental Management Act (see note 26).
[87] Rural District Councils Act (see note 24).

in the Act.[88] In Zimbabwe, RDCs are expected to undertake the management of customary land and resources within their boundaries and this mandate is provided for in the Communal Land Act.[89] Rural District Councils are responsible for the day to day administrative and development planning authority in all of Zimbabwe's rural or communal areas.[90] This is a mandate that has been delegated to the RDCs given their close proximity to the communities.

Rural District Councils are also given the power through the RDC Act to issue permits[91] for the occupation, use, access and management of customary land within their jurisdictions.[92] The power to issue permits corresponds with the power to compulsory acquire property with the minister's consent as per section 78 of the RDC Act.[93] Section 78 states that:

> (1) Subject to subsection (2), a council may, with the *written consent* of the Minister, by compulsion acquire land or any right over land, with or without buildings, whether inside or outside the council area, for the purpose of executing any work or undertaking authorized by this Act where the acquisition is reasonably necessary for the *interests of public* health or town and country planning or the utilization of the property concerned or any other property for a purpose *beneficial to the public generally* or any section thereof. [own emphasis]

Overall, RDCs are given enormous power over who, how and to what extent residents living on communal land can be administered. Scholars speculate that the extension of such authority by the government to RDCs in the management of communal land is to ensure that the state retains power and control over land and natural resources for patronage purposes.[94] This argument is often countered by the assertion of a need to decentralize power from the central government as provided for under section 264 of the Constitution. RDCs would, therefore, be able to represent the interests of local communities and swiftly act on issues arising from the communities.

The importance of Rural District Councils as a powerful institution involved in the establishment of any developmental project on communal land is explicitly spelt out in the

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[88] Ibid.
[89] Communal Land Act (see note 27).
[90] Rural District Councils Act (see note 24: 74).
[91] Most residents residing on communal land do not hold permits over the land in question. Resettled communities in Chisumbanje were however given 'permits' over their irrigated land after constant engagements based on them of 'ownership' of the new irrigation schemes. The certificates however only act as permission to use the irrigation scheme upon annual renewal fees and do not amount to private land ownership.
[92] Communal Land Act (see note 27:9).
[93] Rural District Councils Act (see note 24).
[94] G Gapu 'Legal recognition of Local Communities in Natural Resources Management and Use in Zimbabwe. In: S Mtisi (eds) *Country Experiences on Promoting Community Assets and Rights in the Mining Sector* (2008) 28-31.

provisions cited in the preceding paragraphs. The RDCs on their own can make a 'written' request to the minister to establish projects that are 'beneficial to the public generally' without any reference to how such specific community or group would be able to benefit. These unfettered delegated powers on the pretext of serving the 'public good' may result in developmental projects being established that disrespect, or disenfranchise communities land rights. The RDC should have their own local level policy that weights the impact of a developmental project on the immediate community to ensure a human security-centred approach to development is achieved.[95]

Be that as it may, the Rural District Act is the law providing for the responsibilities and duties of Rural District Councils falls short in providing guidelines on the relationship that should exist between RDCs and local communities if a national development project is to be established within their area of influence. The RDC Act provides more of an implied relationship in which the RDC is supposed to represent the local communities.[96] Whilst this scenario might have been appropriate in 1988 when the Act was conceptualized, the interests, views and consent of the actual communities should be heard directly and not through representative agencies. There are previous instances where RDCs have not adequately represented the communities' interests in conversations with investors. However, the Constitution makes it clear of the need for 'participation of local communities in the determination of the development priorities within their areas'.[97] This mandate makes it imperative that dialogue and consultation of all affected people including women and vulnerable and marginalized groups have to be taken into account before reaching a decision.

The ability of Rural District Councils to be able to sufficiently represent the interests of communities impacted is also hampered by the desire to attract developmental projects in their local areas. Zimbabwe, in general, is facing economic challenges and these challenges have not spared the RDCs' financial resources.[98] In such instances, the objectivity and ability of RDCs to place the best interests of the communities residing on communal land can be questioned. Developmental projects have been an important revenue stream aiding RDCs' administration and service provision budgets in the past.[99]In such instances where a conflict of interests is quite evident, RDCs and communities residing on customary land inevitably find themselves at loggerheads.

[95] United Nations (See note 33).
[96] Rural District Councils Act (see note 24: 78). The advances representative representation which does not necessarily apply in all cases where participatory representation is needed.
[97] The Constitution (See note 12: Preamble).
[98] M Tshuma 'Councils plunge into crisis' *The Financial Gazette* 29 August 2013.
[99] Zimbabwe Environmental Law Association *Analysis of The Key Issues in Zimbabwe's Mining Sector Case study of the Plight of Marange and Mutoko Mining Communities* (2011). DZ Nyawo, D Goredema and MD King 'The Socio-Economic Impact of Chiadzwa Informal Diamond Mining on the Lives of The People of Chiadzwa and It Hinterland *The Dyke* 6 (2) (2012).

Communities are in most instances seen as detractors to development whereas, in such positions, these communities' concerns may not have been well conveyed by the medium of communication which has vested interests in the development initially.[100]

The power, position and voice of Rural District Councils flowing from the Rural District Council Act, however, remain an important avenue that communities can seek to influence so as to strengthen their land rights. The actions of RDC should now be viewed in light of constitutional principles and communities' viewpoints would have to be taken into account. The role that RDCs play in the allocation of permits for use and occupancy by communities living on communal lands does not make these people's opinions any lighter. The provisions that give RDCs the mandate to speak on behalf of the communities are not in tandem with the global movement and more in particular constitutional principles that advance consultation of interested parties on all issues that concern them.[101] Section 13 (2) of the Constitution makes it clear of the need for 'participation of local communities in the determination of the development priorities within their areas'. This mandate makes it imperative that dialogue and consultation of all affected people including women and vulnerable and marginalized groups have to be taken into account before reaching a decision.

3.2.2 Environmental Management Act

Developmental projects by their nature have an environmental cost to the environment. The Act regulating all environmental activities in the nation whilst simultaneously giving effect to section 73 of the Constitution is the Environmental Management Act.[102] The Act provides for environmental principles that are meant to guide any action that has implications on the environment. Two key guiding principles to Zimbabwe's environmental management are public participation[103] and sustainable development.[104] Section 4(2)(e) of the Act provides that all developments to be undertaken in Zimbabwe '*must* be socially, environmentally and economically sustainable' [own emphasis]. Agriculture, mining and infrastructure projects indeed have the potential to contribute to Zimbabwe's economic development. Sadly, the environmental costs to the surrounding communities are usually

[100] Zimbabwe Environmental Law Association *Report on the review of the operations of and legal status of trusts established through the CAMPFIRE Development Fund* (2010).
[101] The Constitution (See note 12: 141) highlights the need for public access to and involvement of parliament in the legislative and processes of its committees. Parliament, an elected body that is meant to represent the communities is mandated to consult the same electorate. In the same light, one may argue that other state organs should follow in the same footsteps to promote ownership and transparency.
[102] Environmental Management Act (see note 26).
[103] Ibid; Section 2 (c). States that the participation of all interested and affected parties in environmental governance must be promoted and all people must be given an opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation.
[104] Ibid; Section 2 (e).

not considered and seen as a hindrance to economic development and therefore not factored in when deciding whether or not to progress with the project.[105]

Social, environmental and economic sustainability are largely analyzed from the broader society's (economic) interests ignoring the interests of local communities who are directly impacted by the development projects. The elevation of economic interests over and beyond other equally and important social and environmental concerns contradicts the functional principle of sustainable development as enshrined in the Constitution. Communities can as such participate in the environmental management processes and question the developments' sustainability. This is the case involving relocation since it affects the communities' social interaction with their accustomed environments.

One critical stage where community participation is promoted within the Environmental Management Act is during the Environmental Impact Assessment (EIA) stage. Section 97 of the Environmental Management Act requires that all activities that are listed in the First Schedule to have the requisite EIA before the commencement of that activity.[106] An EIA is an important planning and decision-making tool that can ensure that the 'environmental and socio-economic costs and benefits of a development project are properly accounted for whilst ensuring that unwarranted negative impacts are avoided or mitigated and that potential benefits are realized.'[107] The EIA process provides spaces to communities for open discussions, accountability tracking and transparency of the proposed projects in a bid to justify why the communal land has to be acquired.

Mining is one of the inherently destructive activities to the environment. In the process of mineral extraction, large tracts of forests areas are cleared and consume huge sums of water. Therefore, it requires that consultations be made with communities residing within proximity to the project site as their lifestyles may be altered. The same case can be said of agricultural development projects that need huge sums of water to establish irrigation facilities. Abstraction of water from the common water sources that communities rely on for their livelihoods needs to be mitigated or in the alternative remedy. Access to safe and clean water is an important and intertwined right to land tenure especially to communities

[105] 'Strike balance between development, environmental management' *Newsday* 19 September 2014.
[106] T Murombo 'The Utility of Public Participation in Achieving Environmental Justice: Comparative Analysis of the United States and Zimbabwean EIA Laws' *Zimbabwe Environmental Law Association* (2008). These projects include entities seeking to undertake drainage and irrigation, mining and quarrying and water supply. All these examples fall within the scope of activities that large agriculture and mining projects undertake in their activities. Sadly, in some instances, EIAs are called from the developers when the government has already decided on the project's importance to national development thus making it difficult to deny such a document in the event that the project's environmental harm is deemed to surpass the economic benefits.
[107] Southern Africa Research and Documentation Center *Business and the Environment* (2000).

that rely on rain-fed agriculture for their food, nutrition and income.[108] The establishment of these developmental projects therefore even without directly leading to relocation may significantly alter communities' livelihoods.

The EIA process, therefore, requires that communities' concerns are taken into account and solutions provided on how to mitigate those effects and to hold the investor liable upon failure to sufficiently fulfil the promised tasks. In this respect, since mining, agriculture and infrastructure development projects fall within the First Schedule of theEnvironmental Management Act list of activities requiring an EIA before commencement, the concern of participation is one that should always be utilized to protect customary tenure rights. Actions were taken by the Marange Development Trust (MDT) in Zimbabwe in seeking clarity regarding how a mining developmental project was going to ensure that environmental and social issues would be taken into account before the mining project commenced operation is one example of how communities' concerns can be heard during the EIA process.[109]

The Environmental Management Act is, therefore, one progressive piece of legislation in Zimbabwe that is alive to balancing the need for economic development with the interests of the affected communities in mind. The Act makes it mandatory that before an EIA certificate can be given to a developer, it is also not enough for mere participation or inclusion of the communities in the process but public consultations should be undertaken.[110] Public consultations necessarily mean that the project proponents must in the case of customary land tenure give room for communities to ask questions and give their viewpoints which have to be taken into consideration. This information is critical in the submitted EIA application to the Environmental Management Agency (EMA) Director General.[111]

Sadly, the Act gives discretionary powers on the Director-General to verify information contained in the EIA document. The Director-General in terms of section 100(3) (c) *may* (emphasis added) consult any authority, organization, *community* (emphasis added) agency or person which or who, in his/her opinion, has an interest in the project. The provision is not couched in a mandatory manner which would greatly benefit the communities through validating such information. This provision, however, offers an opportunity for communities residing under customary land tenure, inevitably with an interest in the project to have their voices taken into consideration or ensure invalidation

[108] E Sithole 'A Gender Analysis of Agrarian Laws in Zimbabwe: A Report' *Women and Land in Zimbabwe* (2002) 29.
[109] *Marange Development Trust v Zimbabwe Consolidated Diamond Company (Private) Limited and Environmental Management Agency* (HC 902/17).
[110] Environmental Management Act (see note 26: Section 99).
[111] Ibid; Section 100.

of the EIA upon submission to EMA. In the alternative, the discretionary decision placed on the Director-General to consult the community whose register of attendance is submitted does not promote accountability and confidence. This being the case, communities should be encouraged to submit an independent written communication to the consultant before, during and after the consultation process and send copies to EMA. These written submissions are imperative to track the manner in which the socio, economic and environmental concerns of the project are considered.

Furthermore, the public consultation process and notice period for communities' participation in the EIA process is currently lacking in many respects. Public consultation lies at the heart of Zimbabwe's constitutional democracy.[112] It goes beyond merely submitting attendance registers and workshops as currently seems to be the case on EIA consultations but an informed and empowered community participation should be the benchmark.[113] In the governance matrix of participation, it is not enough to give communities an opportunity to participate but such an opportunity should be supplemented with relevant information, and training to enable informed policy contributions.[114] Currently, meetings are usually called upon short notice and in a medium incomprehensible to the local community. This significantly affects the participation of the communities and defeats the whole purpose of public consultation and participation.

Prior to the call for public consultations, the notice should be clear to the local community, written in the local language, provided sufficiently in advance and sensitive to gender differences.[115] Furthermore, during the consultation process material facts such as purpose, procedures, rights of the participants including appeal, compensation and timelines should be given to the full grasp of the participants.[116] Provision of such information is in tandem with international best practice and the right to information in the Constitution which requires the provision of *rightful information* (emphasis added) relating to that person.[117] In these instances where such information is lacking, the procedures followed in taking over communal lands from the communities should be challenged as it defeats meaningful participation as the overall objective and makes it difficult to promote accountability.

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[112] The Constitution (see note 12:141). The provision recognizes that even though parliament is the one that has a mandate of making law, public involvement in the legislative and another committee processes should be undertaken.
[113] T Murombo (See note 106).
[114] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).
[115] United Nations (See note 33:9).
[116] FAO (See note 7:21).
[117] United Nations 'Report of the United Nations Conference on Environment and Development' Principle 10 (1992) available at http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (Accessed: 14 March 2017).

Accountability should be promoted throughout the decision-making process. The cost implications associated with getting access to the EIA to most communities' defeats the purpose. An EIA is an important tool that contains public information that can be used to monitor the mitigation measures the developer commits to undertake in the event of being granted the license. Community-Based Organisations (CBOs) should be able to get access to the EIA of developmental projects located in their areas of residence to monitor the implementation of the environmental management plan submitted by the developer.

3.2.3 Traditional Leaders Act

Traditional leaders in Zimbabwe since the colonial era have been playing a pivotal role in as far as customary land tenure management is concerned. The *de facto* position that existed during colonial era has remained unchanged. Customary land remains vested in the state and administered by RDCs with the assistance of traditional leaders for the benefit of communities and their families.[118] The *de jure* position is however that all customary land is vested in the president of the republic who permits the use and occupancy of the land under the Communal Land Act provisions.[119]

The Traditional Leaders Act[120] identifies the important role that traditional leaders play in the lives of communities residing on customary land. In the Zimbabwean context, traditional leaders receive high esteem given the historical, cultural and structural system. The various roles that traditional leaders play in the lives of their communities are clearly legislated in the Act to include amongst others: [121]

a) ensuring that Communal Land is allocated in accordance with Part III of the Communal Land Act and ensure that the requirements of any enactment in force for the use and occupation of communal and or resettlement land are observed;
b) preventing any unauthorized resettlement or use of any land;
c) notifying the Rural District Council of any intended disposal of a homestead and the permanent departure of any inhabitant from his area, and acting on the advice the headman, to approve the settlement of any new settler in this area.
d) publishing such public orders, directions or notices as may be notified to him.

The mandate and respect that traditional leaders have on the groundwork for the benefit of both the traditional leaders and the government. The government reinforces the customary law position given traditional leaders powers, influence and ability to enforce provisions of the Communal Land Act.[122] The structure is also important for logistical

[118] M Rukuni *Report of the Commission of Inquiry into Appropriate Agricultural Land Tenure Systems* (1994) 51.
[119] IG Shivji… et al (See note 46).
[120] Traditional Leaders Act (see note 25).
[121] Ibid, Section 5(1).
[122] Communal Land Act (see note 27).

reasons with the government having the power to remove them from office upon the Minister's recommendation to the President for misconduct and a broadly couched basis of public interest. These same responsibilities and authority give traditional leaders relevance to managing customary land in an era that such land is now vested in the President. These roles clearly identify the important role that traditional leaders play in the management of customary land and resettlement of communities in a new area.

It is clear that in instances that development projects are to be established on customary land, the traditional leader's role to communities is currently reduced to providing notification of the 'public orders, directions or notices' to communities. The broad grounds upon which the traditional leaders can be removed from offices can also effectively reduces their ability to protect their communities in the wake of developmental projects least they risk being removed from office for perceived misconduct.

The role of traditional leaders during the post-colonial era has also not been free of its own challenges. Traditional leaders' structures have been used in the past as a mechanism to advance political interests and this does not resonate with the neutral nature that the office is supposed to maintain.[123] The historical context of where traditional leaders advanced the interests of communities residing on customary land has led to heightened tensions. Communities now view traditional leaders as using the weak customary land tenure system as a ploy by some corrupt leaders to personally benefit themselves at the expense of host communities.[124]

A study by Mandihlare revealed that Green Fuel Company gave Chief Garahwa in Chisumbanje a vehicle and monthly fuel allocation and electrified his homestead. These incentives were meant to gain the chief's support as he is perceived to be the most influential and powerful traditional leader in the community.[125] The same case is also cited in the case of Chief Marange who had a 'mansion' built for him as a result of the commencement of diamond mining in Marange area.[126] It can be deduced from these two cases that personal, political and economic interests of traditional leaders are far more important than protecting the land tenure of their communities when development projects are to be established. This is because personal benefits presented to the chiefs by investors seem to outweigh their customary responsibilities that are expected of them. Communities expect traditional leaders to take the lead in advancing stronger customary

[123] Article 14(1) (a)(b) of the Global Political Agreement of 2008.
[124] J Mujere and S Dombo Large-Scale Investment Projects and Land Grabs in Zimbabwe: The Case of Nuanetsi Ranch Bio-Diesel Project *Paper presented at the International Conference on Global Land Grabbing* (2011).
[125] CM Mandihlare 'Large-Scale Land Acquisition and Its Implication on Rural Livelihoods: The Chisumbanje Ethanol Plant Case, Zimbabwe' unpublished Thesis *International Institute of Social Sciences* (2013).
[126] M Tafirenyika 'Plot to Dethrone Chief Marange Thickens' *Daily News* 27 March 2014.

land tenure. Further, they expect traditional leaders to strictly adhere to the law in wake of proposed developmental projects.

Another challenge faced by traditional leaders in promoting community interests related to communal customary land dwellers is the fact that the traditional leaders do not own the land. The land that traditional leaders are given the mandate to govern all belongs to the President. Traditional leaders just like the RDCs only administer communal land on behalf of the President.[127] This, therefore, compromises the ability of the traditional leadership to effectively represent the interests of their communities. This is particularly the case in those instances where community interests are at loggerheads with government and development companies.

3.2.4 Mines and Minerals Act

Mining is one of the developmental projects that have the ability to supersede the customary land tenure rights of rural communities. The supremacy of mining over the usufruct rights of community on customary land is reflected in the Mines and Minerals Act.[128] The Act governs all mining activities that are undertaken in Zimbabwe. Further, the Mines and Minerals Act is an old and colonial piece of legislation enacted in 1961 has largely retained focus on exploitation of mineral resources to the exclusion of other developmental concepts.[129] Although the concept of sustainable development is gaining traction, it remains alien within the Mines and Minerals Act.

Mining remains a key pillar towards Zimbabwe's economic resurgence as equally reflected in the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim-Asset).[130] The Mines and Minerals Act vest all mineral rights in the President and anyone who seeks to acquire and register mining rights must abide by the provisions given under Part 4 of the Act.[131] Section 26 (a) of the Mines and Minerals Act states that all state land and communal land is land that is open to prospecting for minerals. This provision gives mining prominence to all other activities that can be occurring on such land. The Act pursues a developmental trajectory that is hinged on extractives beyond all other forms of economic, social and cultural development. This implies that tenure over customary

[127] M Rukuni (See note 118).
[128] Mines and Minerals Act (see note 23).
[129] T Murombo 'Law and Indigenization of Mineral Resources in Zimbabwe: Any Equity for Local Communities?' *Southern African Public Law* 10 (2010) 569.
[130] Zimbabwe Agenda for Sustainable Socio-Economic Transformation – ZIMASSET available at www.dpcorp.co.zw/assets/zim-asset.pdf (Accessed: 2 March 2017).
[131] Mines and Minerals Act (see note:2). The dominium in and the right of searching, mining for and disposing of all minerals, mineral oils and natural gases, notwithstanding the dominium or right which any person may poses in and to the soil on or under which such minerals, mineral oils and natural gases are found or situated, is vested in the President subject to the provisions of the Mines and Mineral Act.

land is subverted to all these other interests.[132] It is inconceivable that the government would seek to forgo mineral extraction and challenges to community land rights in instances that mineral deposits are discovered.

The Mines and Minerals Act arguably has some safeguards in place aimed at protecting communities in instances that mining operations are established on customary land. Section 31 (1) of the Act prevents prospecting on 'communal land without the consent of the occupier of the land concerned 'or some person duly authorized thereto by the President and written consent of the RDC.[133] However, this position does not adequately safeguard customary land tenure and speaks to other prevailing legislative positions on customary land. Customary (communal) land is owned by the state and vested in the President and authority over such land given to RDCs to administer. Section 188 (7) of the Act reinforces this position that the RDCs act as landowners in cases that mining will be undertaken in the customary land. In the event that the communities refuse to consent to a development project, their refusal has no merit as they are not the landholders and not duly authorized to represent the President. The RDCs permission inevitably would suffice as consent for the project to be established on the land within their jurisdiction. The role, status and position of RDCs representing the interests of communities in such cases would thus be greatly questioned.

Section 80 of the Mines and Minerals Act provides for the protection of communities' rights to customary land through compensation. It states that:

> Any owner or occupier of reserved ground who is injuriously affected by the exercise of any rights under an authority or order granted under this Part or by any mining operation on any mining location registered under such order shall be entitled to recover compensation from the person whom the authority was granted or in whose favour the order was made or the holder of the mining location, as the case may be, in such amount as may be agreed upon or, failing such agreement, as shall be determined by the Administrative Court.

This provision flies in the face of compensation rights that should be given to the landowner or user. The provision should be read in conjunction with section 188 (7) where compensation is paid to the District Development Fund (DDF) for use of community development projects. This provision assumes that communities who are affected by mining operations may be relocated in the same jurisdiction of the RDC and therefore result in them benefiting from the project. Experiences from the relocation of communities affected by mining operations such as those from Marange to Arda Transau shows

[132] F Maguwu 'Extractivism, Social Exclusion and Conflict in Zimbabwe- The Case of Mining' In Extractives and Sustainable Development II: Alternatives to the Exploitation of Extractives *Friedrich Ebert Stiftung* 2016.
[133] Mines and Minerals Act (see note 23: 31(a)).

otherwise. While compensation may have been paid to the DDF under Mutare RDC, the affected communities were moved to Mutare Urban town council authority. Further, the financial constraints that are being faced by various RDCs have not transcended to reinvestment of the compensation monies to address the needs of the relocated communities.[134] The implications of these provisions are that if there is no direct compensation that flows to the relocated communities, this leaves them at the mercy of the government authorities on how the funds are to be allocated.

Mining developmental projects often result in disputes between miners and farmers. This is largely because minerals occur in the subsoil region often located on land under cultivation. The prominence of mining activities under the Mines and Minerals Act has often led to farmers paying the cost of their agricultural investments. However, the FTLRP resettled communities to new areas which now heightened the conflicts between miners and farmers. The majority of resettled farmers are former liberation war veterans, an important political constituency whose needs cannot be ignored as was the case with the previous white commercial farmers.

The current Mines and Minerals Amendment Bill (MMAB) which is before parliament seeks to address this situation by making provisions of land that is not open to prospecting.[135] Land that is not open to prospecting includes that which *bona fide,* has been cleared or ploughed or prepared for the growing of farm crops, ploughed land on which farm crops are growing, ploughed land from which farm crops have been reaped, for a period of three years from a date of completion of such reaping. It also includes land which has been *bona fide* prepared for the planting of such permanent crops as orchard or tree plantations and land on which such crops have been planted and are being maintained.[136] Further, the bill provides for protection of land that includes ploughed land on which grass has been planted and maintained for harvesting, rotation of crops or stock feeding, for a period of six years from the date of planting.[137] However, if the land is not utilized through the growing of farm crops or of such permanent crops that may include orchards or tree plantations and within two years after having been *bona fide* cleared, ploughed or prepared, then that land will become open for prospecting. The land were communities residing in communal areas will in most instances fall within the definition of land not open to prospecting. This means that such land to be secured therefore resolving current tensions and conflicts.

[134] S Ephraem 'Checheche: A 'city' in the making' *Manica Post* 29 April 2016.
[135] H.B. 19,2015: Section 65.
[136] Ibid, Section 71 (a)(b)(c)(d).
[137] Ibid, Section 71 (e).

3.3 Legislation specifically aimed at the acquisition of land in Zimbabwe

The main legislation applicable in regulating communities residing on customary land is the Communal Land Act, Land Acquisition Act and the Rural Land Act. These acts are the legislative framework that facilitates ownership, acquisition and transfer of customary land in Zimbabwe. The above-mentioned Acts highlight the various land tenure-related issues that have a bearing to communities. The Communal Land Act allows for agriculture, infrastructure developments to be undertaken on customary land. The nature of legal protection that is granted to communities residing under customary land tenure is also clarified including the procedures that should be followed when one losses their rights.

3.3.1 Communal Land Act

3.3.1.1 Introduction

The Communal Land Act[138] regulates the occupation and use of land that is commonly classified as communal land in Zimbabwe. According to the Food and Agriculture Organisation (FAO), about 42 percent of total Zimbabwe, land area is governed under the customary land tenure system (communal land) whilst accommodating about 66 percent of the country's population.[139] This effectively indicates that approximately 8.514 million Zimbabweans are depended for their livelihoods on customary land ownership which as described in previous chapters is less secure. The establishment of developmental projects and subsequent relocation of affected communities, therefore, affects the majority of the population. This makes it imperative to address these insecurities. This section will unpack important provisions that are within the Communal Land Act.

3.3.1.2 Purpose and provisions of Communal Land Act

In Zimbabwe, the communal land is vested in the President who has the authority to give permission on how such land should be used within the confines of the Communal Land Act provisions.[140] The power over communal land management is delegated to various RDCs operating in the areas where such communal land exists.[141] Communities residing on communal land are therefore not in a position to either own such land nor make decisions over such land use since that mandate is circumscribed to certain entities by law. This position is usually described as the state having *de jure* [legal] land ownership rights over communal land.

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[138] Communal Land Act (see note 27).
[139] E.M. Shumba 'A Brief on the Forestry Outlook Study' in Forestry Outlook Study for Africa (2001) available at http://www.fao.org/docrep/004/AC429E/AC429E02.htm (Accessed: 2 March 2017).
[140] Communal Land Act (see note:3).
[141] Ibid, Section 8.

Land tenure comes with a bundle of rights such as land use. The Communal Land Act vests use rights with communities residing on the communal land irrespective of them not having ownership rights. Communities, therefore, have *usufruct rights* over the communal land in question, that is land use and management rights for agriculture, housing and pasture.[142] The interpretation section of the Communal Land Act,[143] defines land 'use' as including but not limited to 'the erection of any buildings or enclosure, ploughing, hoeing, the cutting of vegetation for firewood and building materials, pasturelands for animals, the taking of sand, stone or other materials therefrom'.[144] This bundle of rights is what the Rukuni Land Commission identified as *exert de facto* [factual or on the ground] rights.[145]

The usufruct rights given to communities under the Communal Land Act grant them rights to occupy such land until a time such rights are legally terminated in accordance with the Act. The interests that the communities therefore hold can be extended to limited real rights over the land in question upon registration.[146] Registration of the limited real right makes it possible for the communities to be adequately protected and enforce them against other people in future. A limited real right can be defined as the right that one has to the property that belongs to another person other than the holder of such a right.[147] A limited real right is different from a real right in that a real right gives the right holder power to subtract for the dominium and is enforceable against successors in title.[148] Therefore communities residing on communal land can acquire a limited real right in the land in question though it is vested in the President through the RDCs.

The *usufruct rights* that are given to communities under the Communal Land Act, however, place several caveats on what is permissible and impermissible over the land in question.[149] The Act prohibits the extension of benefits that can be derived from use of communal land. In the event that those benefits are not derived from a previously acquired right in existence before the 1st of February 1983, a permit is granted for use of the land and unless closely related to the person so granted the *usufruct rights* in the two previous positions. The Act further makes it an offence to contravene these provisions with one even being liable to a year's imprisonment.[150] These restrictions mean that no person can

[142] IG Shivji (See note: 46).
[143] Communal Land Act (see note: Section 2).
[144] Ibid, Section 2.
[145] M Rukuni (See note 118).
[146] AJ Van der Walt *Constitutional Property Law* 2nd ed (2005) 319.
[147] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's: The Law of Property* 5th ed (2006) 47.
[148] H Mostert & A Pope *The Principles of The Law of Property in South Africa* (2010) 49. Only real rights to land can be registered under the deeds registry and therefore enforceable against successors in title. Limited real right which is sometimes called personal rights, on the other hand, do not bind successors in title.
[149] Communal Land Act (see note 27: 7).
[150] Ibid; section 7(2).

occupy or use communal land without the required permission from the RDC or the traditional leaders of the area in terms of the Traditional Leaders Act.[151] These restrictions are warranted deterrent mechanisms to prevent illegal communal land occupation and ensure that the state knows who is residing in a particular area. It is through such information and records kept that developers are supposed to be informed of the families' magnitude that will be impacted by the developments and decide service deliveries to be provided in cases of relocation.

The responsibility of allocating the usufruct rights to communities on communal land rests with the Rural District Councils.[152] The RDCs are given fettered powers upon which to exercise such a mandate. The consent that is given for one to occupy communal land is given after taking into account the customary law of the allocation, occupation and use of land in the area and the views of the traditional chief in the area concerned.[153] This is an important provision as it highlights the significant role that culture plays in the modern day irrespective of previous land ownership powers having changed. It would not be right to take over land and allocate it to other users without bearing in mind the current users and concerns of local communities which would be represented by the traditional Chief.

The Communal Land Act is also conscious of the idea that in some instances there may be a need for such land to be used for other land uses other than communal residence or agriculture. In those instances, consultations are mandatory with the entity within whom the power to allocate land is given, in this case, the RDCs working in conjunction with traditional leaders.[154] The complexity highlighted here makes it difficult to identify whether RDCs are best placed to give and represent the interests of the communities. This is in light of the fact that traditional leaders may not have communicated that such land is occupied or communities not having registered for a permit with the RDCs. The RDCs though seen as guardians and representatives of the interests of communities in the Act may not be rightfully placed to share the aspirations of the people on the ground. It would be important that the Act calls for consultations of the actual people residing on the land in question.

A sharp contrast can be made on how land use on the communal land is recognized in the modern-day era under the Communal Land Act. Section 9(1) of the Communal Land Act gives RDCs the power to issue out ‘permits’ for use of communal land for various uses. The services upon which permits may be issued include state administrative purposes, religious and educational purposes, hospitals, clinics, hotels, shops or other business premises or purposes. These services are very important for improving the standard of living of communal land inhabitants. However, what is shocking is that these

[151] Traditional Leaders Act (see note 25).
[152] Rural District Councils (see note 24: 8).
[153] Communal Land Act (see note 27: 8 (2).
[154] Ibid; Section 6(1)(a).

are the only services in the Act that should be granted 'permits' yet the beneficiaries are given 'permission' to use the communal land.

One should recognize that there is a sharp distinction between a permit and permission in as far as security of tenure is concerned. The Black's law dictionary defines a permit as an official document that is written by someone in authority empowering the grantee authority to do something not forbidden by the law which would otherwise be forbidden without such authority.[155] On the other hand, permission is the action of authority. This on its own highlights the hierarchy and preference that is given to commercial services on communal land as being superior when compared to the usufruct rights of communities that flow from the statute. A permit usually entails information of the permit holder, the time frames of the permit and its transferability. Permission, on the other hand, is personal to the person whom such approval is given and in most cases, the power holder is the one giving permission whom may decide to withdraw it.[156] Contrary to communities residing on the communal land itself, the commercial and social amenities facilities are granted a more secure tenure in the wake of developmental projects that the communities are meant to serve.

One of the other practical challenges facing host communities in securing their customary land tenure rights are the costs involved in bridging the long distances between rural communities and offices of the RDCs. The RDC offices are usually far from the areas where communities reside. As such, this function is usually undertaken by local traditional leaders in line with their other customary responsibilities. Local leaders, however, do not report such decisions on 'permission' to the RDCs, a development that results in communication breakdown. The breakdown in communication between these two organs of state usually affects the communities on the ground and often gives rise to mistrust between RDCs and traditional leaders. In some instances, traditional leaders are accused of giving land for residential or agricultural purposes to people in areas that are not designated for settlement by the local authorities.[157] In turn, traditional leaders accuse RDCs of usurping their customary powers to give land and manage their local traditional affairs as highlighted in the Traditional Leaders Act.[158] This position, therefore, creates serious ambiguity and overlap on the roles played by traditional leaders and state institutions especially when developmental projects are to be established. Some of the communities' places of residences may therefore not be known by the RDC and 'permission' unavailable to at least verify their status. In the event of developmental projects, this affects the cases for affected communities to claim compensation.

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[155] HC Black *Black's Law Dictionary* 2nd ed (1910).
[156] Ibid.
[157] J Makumbe. Local authorities and traditional leadership. In J de Visser, N Steytler and N Machingauta (eds) *Local Government Reform in Zimbabwe: A Policy Dialogue* (2010) 87-99.
[158] Traditional Leaders Act (see note 25: 26).

Conflicts and jurisdictional matters between RDCs and traditional leaders present challenges in relation to the fulfilment of constitutional objectives and rights.[159] Traditional leaders can argue that some of the actions of the RDCs are against national objectives mentioned in Section 16(3) and Section 282 (1) (d) of the Constitution. These constitutional values require that the state and all institutions and agencies of government at every level must take measures to ensure due respect for the dignity of traditional institutions. Further, Section 16(1) of the Constitution emphasizes the need for the state and all institutions to promote and preserve values and practices which enhance the dignity, well-being and equality of Zimbabweans.[160]

The Communal Land Act sets out the procedures that should be followed when land forming part of the communal land is to be set aside. This procedure is unique to activities that fall outside the ordinary scope of the rural development plan, regional or town layout or establishing a township, village and business.[161] The minister appointed to administer the Communal Land Act in consultation with the RDCs has the powers to set aside communal land which 'he/she considers is in the interests of inhabitants of the area concerned or in the public interest or which he considers will promote the development of Communal Land generally or of the area concerned.'[162] This provision includes any developmental project that is sought to be established in the nation even if it may not be in the best interests of the inhabitants of the area but is seen to result in the development of communal land in general. This is one of the basis that developmental projects are introduced to the nation without particularly getting the opinions of the people directly affected.

The setting aside of land earmarked by the minister for purposes in the interests of the inhabitants and public interest is supposed to be communicated to the parties affected and give them 'reasonable' notice. The legal matters may have far-reaching implications such as 'ordering all persons... the minister may specify…. to depart permanently with their property from the land concerned within reasonable notice the minister may specify'.[163] Interesting, most citizens in Zimbabwe still find it difficult to get hold of the various government statutory instruments yet this is the means government communicates legal matters.

Statutory instruments are a great means of communicating government information and are used for practical reasons. However, most people do not have access to the

[159] H Agere 'Rural Land Who Is in Charge?' *Sunday Mail* 8 May 2016.
[160] F Chasi 'Adverse Report of the Parliamentary Legal Committee on Notice of Amendments to the Land Commission Bill [H.B. 2, 2016.]' *Parliament of Zimbabwe* (2017). The understanding and interpretation of the agricultural land are concerned is a bone of contention role and reason why the Land Commissions Bill has taken long to be passed.
[161] Communal Land Act (see note 27: 10 (i)).
[162] Ibid.
[163] Ibid; 10 (3).

government offices where the statutory instruments are placed for public inspection and therefore defeating the purposes of communication.[164] This provision if tested against the right to information provisions and interpreted in accordance with the spirit of the Constitution may be found wanting.[165] The information under discussion carries life-changing decisions on the persons affected and therefore the means of communication may need to be expanded beyond mere communication through statutory instruments in the government gazettes to include local newspapers and radios in the areas concerned. Legislation such as the Administration of Deceased Estates Act[166] makes communication in the media mandatory in addition to the use of a statutory instrument or government gazettes. It would, therefore, be absurd to think that there is greater need to communicate information on deceased persons to a broader audience beyond life-changing decisions to living people in as far as the land of their residence is concerned.

One other problem with this provision is the notice period that should be given to affected parties. The act states that the minister may specify the reasonable period in his notice. This phrase is absurdly too broad and vague for it to continue existing in our statutory books especially in an era were ministers abuse such phases to give such occupants less than a weeks' notice as was the case before the relocation exercise in Marange. The law, however, provides remedies which can be used to test minister's decision on reasonableness grounds.

In the case of *Bato Star Fishing (Pty) Ltd V Minister of Environmental Affairs and Others*[167] the test to discern if the decision passes reasonableness was laid out. A reasonable decision is one that takes into account nature of the decision, identity and expertise of the decision maker, a range of factors relevant to the decision, reasons for the decision, nature of competing interests involve and impact of the decision on the lives and well-being of those affected.[168] Whilst this is an important avenue that can be used to contest the time frame that can be given within the notice period to vacate from the land, it would be imperative for the law to state the minimum time period given especially where the severity of the harm is high and often irreversible. Approaching the courts is a redress mechanism that in most cases in reactionary as opposed to taking proactive safeguarding measures.[169]

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[164] Unite Nations (See note 33).
[165] N Chishakwe 'Right of Access to Information, A tool for environmental & socio-economic rights protection' OSISA (2014).
[166] Administration of Estates Act (Chapter 6:01).
[167] 2004 (4) SA 490 (CC).
[168] Ibid, Para 46.
[169] *Marange Development Trust v The District Administrator Mutare District and Others* (HC 12237/16). In the case, the Provincial Administrator of Mutare and Zimbabwe Consolidated Diamond Company (ZCDC) had embarked on a process to relocate affected families in Marange upon given them 48 hours' notice. The communities were also asked to sign consent forms to be relocated without compensation. MDT instituted an urgent chamber application in the High Court against the actors for not following due process

The last important provision in as far as communal land is concerned relates to the issue of compensation. Compensation can be defined as something that is paid to address the loss incurred which coincidentally is monetarily pegged.[170] Section 12 seeks to particularly address the issue of compensation of the parties whom would have been dispossessed or suffered a diminution of the right to use and occupy the communal land. Compensation is limited to land that would have been taken to form state land, to advance communal land development or providing water rights.[171] Interesting the Communal Land Act sees compensation as being adequate where one is given the right to occupy or use alternative land on its own.[172] This is indeed the best means of compensation in as far as land is concerned since land is the foundation of life that these communities rely upon.

Compensation of the land should however not be taken literally as has been the case in Marange were people were moved from to an area that would need them to change their accustomed way of life. Compensation should also take into account the social, economic and cultural values of the affected inhabitants least that would not account for compensation.[173] Furthermore, monetary compensation should only be considered in instances where an agreement has proved impossible or agreement cannot be reached subject to the provision in the Land Acquisition Act.[174] Monetary compensation is also paid to the landowner and in this case, since communities do not own the land the compensation would not be paid to them as they are not the landowners and at the very most they get compensation for their physical investments.

While these compensation provisions seem progressive, they are negated by the lack of clear guidelines as to how and when the issue of compensation will be decided. The discretion to negotiate the form and type of compensation and when it will be paid is left to the occupiers and development projects companies or to the Administrative Court in the event of them failing to agree. A case at point on the matter is one between *Malvern Mudiwa and Others v Mbada Mining Private Limited and Others.*[175] In that case, the community was seeking an order to stop the respondents namely; Mbada Mining Private Limited, Canadile Mining Private Limited, the Zimbabwe Mining Development Corporation, Minister of Mines and Mining Development and the Minister of Local Government, Urban and Rural Development from evicting or relocating any persons from Chiadzwa until there was an agreement on the levels of compensation for displacement. With regards to compensation, the judge said that the respondents had not refused to pay compensation, although no agreement had been reached on the amount of

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of the law as enshrined in section 73 of the Constitution that protects one against arbitrary eviction without a court order.

[170] FAO (See note 7).

[171] Communal Land Act (see note 27: 12 (1).

[172] Ibid; 12 (1) (i).

[173] FAO (See note 7).

[174] Communal Land Act (see note 27: 12 (1) (c) (ii).

[175] HC 6334/09.

compensation. The judge reasoned that in the event of a deadlock in negotiations, the applicants were entitled to approach the Administrative Court for Adjudication in terms of section 80 of the Mines and Minerals Act. This argument is also in line with the Committee on Economic, Social and Cultural Rights' General Comment 7.[176] General Comment 7 requires state parties ensure affected individuals timely and adequate compensation prior to any evictions being undertaken.[177]

This discretion as to the time compensation is to be paid relinquishes communities bargaining power. It has resulted in the arbitrary displacement and relocation of communities and eventually payment of unfair and inadequate compensation to communities by the developmental project's proponents. Clear and specific provisions within the Communal Land Act or the adoption of a clear policy framework to ensure that communities are not evicted arbitrarily and before value and time compensation due to communities for the relocation from communal land for purposes of implementing projects that may not benefit them is needed. These provisions should be specifically stated in the Communal Land Act than making reference to the complicated process of land acquisition which is stated in the Land Acquisition Act.

The Communal Land Act also needs amendments to include provisions on appeals by residents of communal land against the decision of the Minister to set aside communal land for the defined purposes. This may be solved through appeals against the Ministers decision to the Administrative Court. This can at least give effect to the constitutional right preventing arbitrary eviction without a court order as contemplated in terms of Section 74. Furthermore, the concept of reasonable notice period to vacate communal land set aside for other developments by the Minister should be removed and a specific notice period of more than 3 months can be included. This will give people time to prepare for relocation as opposed to situations where communal residents may be given one week notice as what happened in Marange when communities were relocated to facilitate diamond mining operations between 2010 and 2013.

3.3.2 Land Acquisition Act

The Land Acquisition Act[178] is another main legal statute providing for the acquisition of land in Zimbabwe. The Land Acquisition Act has been amended several times to give legal effect to the FTLRP. The Act contains a set of declaratory provisions relating to the application of the FTLRP. It defines the term 'Land Reform Programme' as the Land Reform and Resettlement Programme and Implementation Plan (Phase 2), published in

[176] United Nations Committee on Economic, Social and Cultural Rights (UNCESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22, available at http://www.refworld.org/docid/47a70799d.html (Accessed: 21 September 2017).
[177] Ibid. The issue of compensation seats at the core of communities that are to be relocated given the emotional, social and financial investments amongst others that would have been made at the area in questions.
[178] Land Acquisition Act (see note 28).

April 2001 (as re-issued and amended from time to time). This process was about the programme of acquiring agricultural land for resettlement purposes which commenced under the terms of the principal Act on the 23rd May 2000.[179] To a large extent, the Act has great implications on access to land for the communities that would need to be resettled after a developmental project has been established.

The Act empowers the President or the Minister after being authorized by the President to acquire land.[180] The acquisition can be done in cases where it is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or to any section of the public; or for settlement for agricultural; or for purposes of land reorganization, forestry, environmental conservation or the utilization of wildlife or other natural resources or for the relocation of persons dispossessed of land.[181] Ideally, the acquisition of agricultural land for resettlement purposes is to be done for people who are landless and deserve to get land for different agricultural activities depending on the purpose for which land would have been acquired.

The above legal provisions in the Land Acquisition Act is for purposes of compulsory acquisition of land similar to the property rights provisions related to acquisition of agricultural land in Section 72(2) of the Constitution. It can easily be interpreted to mean that although the Land Acquisition Act was passed before the new Constitution, at least it gives effect to the constitutional provision in relation to reasons why land may be compulsorily acquired. The basis for which land may be acquired as stated in the Land Acquisition Act and the Constitution are strikingly similar. It is submitted that the government wanted to protect the gains that had been made during the land reform program by entrenching those reasons in the highest law in the land knowingly that it would be difficult to amend such a clause. The Land Acquisition Act, therefore, makes the government able to acquire agricultural land resulting in the relocation and displacement of communities as a result of developmental projects.

A notable feature evident in the Land Acquisition Act is the detailed procedures for compulsory acquisition of agricultural land for resettlement purposes. The procedures are stated in Section 5 and subsequent sections. Some of the procedures include the issuance of a notice of compulsory acquisition which should be published once in the government gazette and once a week for two consecutive weeks in a newspaper circulating in the area in which the land to be acquired is situated.[182] The issuance of a notice in this manner is different to the requirement that is placed under the Communal

[179] Ibid.
[180] Ibid; 3.
[181] Ibid.
[182] Ibid; 5 (1).

Land Act which requires communication to communities through a statutory instrument only and not in the newspaper at the very least. The means and time period of communication help communities and other stakeholders to know the status of the land in question and this can enable those interested to find ways of legally contesting such notices. The notice can also serve the important function of ensuring community participation in the process leading to relocation.

Another important procedure that has to be followed in acquiring land in cases where the acquisition is contested is for an application by the acquiring authority to the Administrative Court.[183] This is an important provision that places safeguards against the deprivation of ones right without confirmation by another independent body, in this case, the Administrative Court. In terms of Section 7(4), the Administrative Court is allowed to prevent the acquisition of land if in the courts view the acquisition is not reasonably necessary. Some of the grounds that are deemed necessary for acquisition include interests of defence, public safety, public order, public morality, public health, town and country planning.[184] The court can also, on the other hand, deem land acquisition as reasonably necessary where it relates to rural land, if the land is to be used for settlement for agricultural or other purposes; or for purposes of land reorganization, forestry, environmental conservation or the utilization of wildlife or other natural resources; or relocation of dispossessed persons.[185] Strikingly, where the Administrative Court refuses to grant an order to confirm the acquisition, it may order the acquiring authority to withdraw the preliminary notice or order the acquiring authority to return the land acquired.[186]

The Administrative court is an important avenue that still exists in cases related to the acquisition of agricultural land and the same processes are warranted to apply equally in terms of the acquisition of communal land. Such processes though not mandatory are one which has not widely utilised by communities yet there are cheap and can result in a similar result that is needed by using the court system. In instances where internal dispute resolution processes are provided, communities should be able to take advantage of them and be exhausted least the court directs the parties to first use the resolution mechanisms.

The Land Acquisition Act also contains provisions relating to the payment and assessment of compensation for land that is compulsorily acquired. These provisions also apply to situations where there has been disagreement on the issue of compensation cited under the Communal Land Act.[187] Section 16 imposes a duty on the acquiring authority to pay fair compensation within a reasonable time only for land which is not

[183] Ibid; 7.
[184] Ibid; 7 (4).
[185] Ibid.
[186] Ibid; 7(5).
[187] Communal Land Act (see note 27).

specially gazetted land or agricultural land acquired as prescribed in terms of Section 72(2). Different factors are used to assess compensation for land in an endeavour to arrive at compensation that is fair and reasonable. These factors include claimants right to be compensated for the loss and the public interest in the land concerned taking into account nature, location, quality and other factors.[188]

It is important to note that compensation for the loss of land as a result of developmental projects and subsequent relocation cannot be monetarily quantified. Terminski[189] correctly identifies that the sufficient compensation should be able to consider:

I. Loss of access to previously used resources communities depended such as water, agricultural land, pastures, forests, common agricultural land, rivers;
II. Non-material losses associated with the displacement;
III. Negative consequences of change or modification of the previous economic model (especially the involuntary transition from a land-based to a cash-based economy);
IV. Deterioration of economic and environmental conditions in the new place of residence; and
V. The economic consequences of disarticulation of larger communities and loss of existing community, neighbourhood or family ties.

The monetary compensation provided to most relocated communities would, therefore, be inadequate if these factors described above are not taken into account. An example is the Marange communities' grievances emanating from their relocation from a rural set up to an urban set up which now expects them to pay for water services they had never undertaken previously. Furthermore, such communities constantly lament that the one-hectare area that there were allocated is insufficient to cater for their homestead, agriculture and pasture needs which inevitably lead them to sell their livestock which was a source of revenue savings.[190]

Another example is the community from Chisumbanje who lost large tracts of dry land and resultantly the males feel the 0.5 hectares of land are inadequate for their masculinity and as such left the 'small' pieces of irrigation land for their women counterparts. It is important that compensation should be integrated with mechanisms that are aimed at ensuring swift adaptation to the new environment and rehabilitation programmes. It is through such efforts that the lives of relocated communities can continue with their existing living conditions at the new relocation sites.[191] Monetary compensation is, therefore, a temporary solution and in most cases, would not match the long-term social, cultural, environmental, and economic costs of relocating the communities to undertake developmental projects.

[188] Land Acquisition Act (see note 28: 20 (2).
[189] B Terminski *Development-Induced Displacement and Resettlement: Theoretical Frameworks and Current Challenges* (2013).
[190] C Madebwe (See note 16).
[191] World Bank (See note 13).

The provisions cited in the Land Acquisition Act must be interpreted in light of the Act's objectives which is to deal with land acquired for resettlement and not communal land. The provisions further state that one can make a claim for compensation with the administrative court within 60-day notice being served unless one can show good cause why the time was not satisfied.[192] In most cases, rural communities do not have the information nor the resources to approach the courts and argue for a protracted time for their compensation. It is important to reiterate that communities residing under communal land do not own the land and as such the compensation would in this respect not accrue to them in as far as land is concerned. Furthermore, the government in some cases has used its land ownership as the basis of acquiring shareholding status in investment projects such as the Chisumbanje green fuel project and Marange diamond mining. In as such no significant monetary contributions are noted to have trickled down to the benefit of the affected families.

However, the Land Acquisition Act does not specifically apply to Communal Land.[193] Communal land can only be acquired in terms of the Communal Land Act through a declaration by the President to any part of communal land for certain purposes.[194] Furthermore, not all the laid out legal procedures were followed during the FTLRP, since there was a lot of chaos and legal uncertainties in the way the whole programme was implemented. Notably, the president of the Zimbabwe was quoted saying 'We will not brook any decision by any court preventing us from acquitting any land. We will get the land we want from anyone, black or white and we will not be restricted to underutilized land.'[195] It is a result of such statements and the failure of the local judicial system to abide by the local statutes in place that created great confusion around the procedures for legal acquisition of land, ownership status, occupancy, and validity of some offer letters as well as the terms and conditions of occupancy of farms.[196]

A typical case seeking clarity on such issues resulted in legal action before a regional tribunal in the case of *Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*[197] seeking legal reprieve. The applicants approached the Southern African Development Community (SADC) Tribunal challenging the Government of Zimbabwe's compulsory acquisition of agricultural land. The tribunal had to decide on a number of issues namely its jurisdiction to hear the case, racial basis of the land acquisition and payment of compensation. The tribunal decided that it had jurisdiction to hear matters, especially where municipal law ousts local courts ability to hear cases.[198] In such instances, the international requirement

[192] Land Acquisition Act (see note 28 ;22 (2).
[193] Communal Land Act (see note 27: 3(4).
[194] Ibid.
[195] A Norman *Robert Mugabe and the betrayal of Zimbabwe* (2004).
[196] Ibid.
[197] *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008).*
[198] Ibid; Page 41.

that one should exhaust internal remedies becomes defunct and aggrieved citizens can approach the SADC tribunal for relief. The tribunal also found Zimbabwe's land acquisition process as indirectly discriminatory on racial basis as it disproportionately impacted a certain racial group of people.[199] With regards to compensation, the tribunal found the limitation to compensate for improvements only whilst excluding the agricultural land itself as absurd and clear violation of international law.[200]

The tribunal's decision in the case of *Campell*[201] is key regardless of its subsequent dissolution. The Tribunal has however been reestablished with re confined mandate limited to adjudicating disputes amongst states only to the exclusion of natural and legal persons and States.[202] The tribunal's decision, therefore, indicates that regardless of internal limitation clauses that exclude local court's jurisdiction, one is not barred from approaching higher court bodies, in this case, will be the African Commission on Human and Peoples Rights (ACHPRs). Furthermore, the issue of compensation will always remain a contentious issue that will need to be resolved when communities are deprived of their land. Currently, the only basis to which communities may not claim compensation for the land in question over and beyond the improvements is because such land is vested in the president and not the communities themselves whom only have usufruct rights.

3.4 Securing communal tenure rights in the Constitution

Land rights in most instances are regulated either through the constitutional property rights frameworks or land legislation as discussed above. However, a significant amount of laws predates the Constitution of Zimbabwe therefore not correctly reflecting the constitutional framework and aspirations. The Constitution, therefore, provides opportunities upon which the land rights in Zimbabwe should be understood and interpreted. Several land-related legislation have been identified in need of constitutional realignment. This section will explore the opportunities that have been presented by the Constitution and the impact it has on land acquisition, land tenure and redress in the context of Zimbabwe's constitutional property rights law.

Land acquisition for developmental projects is a very sensitive and emotive issue especially to communities that are directly affected. More particularly, apart from the fact that land acquisition for mining, agricultural and infrastructural purposes may bring social and economic benefits to the broader society, there is little doubt that it has negative impacts on the economic, social and cultural rights of those communities that are affected by the developmental process. These developmental investments cause immense disruption to the livelihoods of those communities whose land is acquired. One of the

[199] Ibid; Page 53.
[200] Ibid; Page 57.
[201] Ibid.
[202] Ibid.

unwarranted effects is the relocation of families from their accustomed communal land to new areas which results in the loss of agricultural and pasturelands, crops and fruit trees and economic opportunities. FAO rightly captures the effects of developmental projects and subsequent relocation when it notes that developmental projects: [203]

> may separate families, interfere with livelihoods, deprive communities of important religious or cultural sites, and destroy networks of social relations. If compulsory acquisition is done poorly, it may leave people homeless and landless, with no way of earning a livelihood, without access to necessary resources or community support, and with a feeling that they have suffered grave injustice. If on the other hand, governments carry out compulsory acquisition satisfactorily, they leave communities and people in equivalent situations while at the same time providing the intended benefits to society.

The impact of developmental projects is significant. It is therefore imperative that the land rights of communities in an era of increasing developmental projects be addressed in the context of constitutional rights.

The progressive recognition of the need to promote the interests and needs of communities to communal land is reflected in the founding values and principles of the Constitution. Section 3 of the Constitution has several values that act as the vision of the nation and which should be used in the interpretation of the Constitution. These important founding values of Zimbabwe include the supremacy of the Constitution; rule of law; fundamental human rights and freedoms; the nation's diverse cultural, religious and traditional values; recognition of the inherent dignity and worth of each human being; recognition of the equality of all human beings; gender equality; good governance; and recognition of and respect for the liberation struggle.[204]

Importantly, land is identified as an important resource within the national objectives and principles which should be equitably shared.[205] The majority of the Zimbabwean population reside on communal land which is less secure and same time under ever-present threat of the need to pursue economic development. Section 3(2)(J) becomes key as it states that the principles of good governance shall bind the state and all institutions and agencies of government at every level towards equitable sharing of national resources including *land [own emphasis]*. Equitable sharing, in this case, should also be read in conjunction with section 289 which seeks to address the previous historical position that prevailed in Zimbabwe. The state should in instances that it has vested rights lead by example in promoting equitable sharing of the land resource in manner that gives protection to both the 'receiver' and that the 'giver' will not arbitrary request the gift back in return at any time.

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[203] FAO (See note 7).
[204] Ibid; 3 (1) (a).
[205] Ibid.

Additionally, the Constitution of Zimbabwe also recognizes individual and or collective property rights.[206] The property rights clause in the new Constitution is critical for promoting secure land tenure for local communities as it highlights that property is not limited to land. The Constitution defines property as 'any description and any right or *interest* in property.'[207] This definition ensures that the term property is not understood within the restrictive sense of a right but in a broad manner to include 'legal interest'.[208] Property, therefore, refers to a wide range of property rights which are not limited to ownership as it is usually understood in the narrow sense. The term property rightfully should be understood within the context of ownership, limited real rights, some personal rights and statutory rights.[209] As already noted, communities do loose property in the form of agricultural and pasturelands, houses, fruit trees and crops during involuntary displacement and relocation because of developmental projects. The non-proprietary rights and interests that are not usually recognized under private law in the constitutional law era should be given recognition.[210]

Real rights can be established from the servitudes and security rights registered under the Deeds Registries Act.[211] Personal rights or 'interests' over property, on the other hand, are usually established through contracts or are simultaneously established by legislation. Van der Walt is of the opinion that courts should utilise legislation as a basis upon which one can secure land use rights that have the potential to affect human dignity and security of the people.[212] The protection of land use rights given to communities by the Communal Land Act, therefore, qualifies as such personal interest rights worthy of protection under the banner of property rights regardless of them not widely recognised under private law. The Constitution, therefore, presents opportunities upon which Zimbabwe can move away from the previous position where black land use rights were eroded and disregarded under colonisation to a situation where such rights are now recognised. The property clause can, therefore, protect property, not in the traditional, private law context but should be within the constitutional context that also respects cultural rights.

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[206] Ibid; 71.
[207] Ibid.
[208] J Tsabora 'Reflections on the Constitutional Regulation of Property and Land Rights under the 2013 Zimbabwean Constitution' *Journal of African Law* (2016). The author identifies this definition as being abstract and therefore offering the courts to give detailed guidelines on the exact content of this definition. The courts would need to guide as to the content, scope, and nature of the constitution's definition of property.
[209] AJ Van der Walt 'Tradition on Trial: A Critical Analysis of The Civil Law Tradition in South African Property Law' *South African Journal on Human Rights* 11(1995) 169-206.
[210] Ibid.
[211] Deeds Registries Act (see note 75).
[212] AJ Van der Walt (See note 146:187).

In the South African cases of *Port Elizabeth Municipality*[213] *and Modderklip,*[214] the court had an opportunity to develop the understanding of one's interests in property. One's interests need to be equally protected as one's ownership rights. The Constitutional Court held that unlawful occupiers had a constitutional and statutory right not be evicted by both the government and a private landowner until alternative suitable accommodation had been sourced. This court judgments went against the traditional understanding of private law property rights that give the landowner 'absolute' powers to which he can exclude anyone from benefiting from his rights. The occupants of this property did not have any rights at all but had occupation interests based on s26 (3) of the Constitution and legislation. Their need and benefits derived in the property concerned justified them being viewed as having property interests under the Constitution. Property interests in land for shelter, agriculture and pasture purposes should, therefore, be equally respected on the same basis as servitudes, real rights and registered long terms leases based on the doctrine of notice or legislation (*huur gaat voor koop* rule).[215]

Property rights give one the ability to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property.[216] The acceptance of the argument posed above that property interests fall within the constitutional definition of property means that all the other provisions in s71 must be complied with especially in terms of deprivation of such property. The Constitution provides that:[217]

> (3) Subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied—
> (a) the deprivation is in terms of a law of general application;
> (b) the deprivation is necessary for any of the following reasons—
> (i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
> (ii) in order to develop or use that or any other property for a purpose beneficial to the community;
> (c) the law requires the acquiring authority—
> (i) to give reasonable notice of the intention to acquire the property to everyone whose interest or right in the property would be affected by the acquisition;
> (ii) to pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition; and
> (iii) if the acquisition is contested, to apply to a competent court before acquiring the property, or not later than thirty days after the acquisition, for an order confirming the acquisition;
> (d) the law entitles any person whose property has been acquired to apply to a competent

[213] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[214] *President of The Republic of South Africa And Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (5) SA (CC).
[215] PJ Badenhorst (See note 147:432).
[216] The Constitution (see note 12: 71(2).
[217] Ibid, 72.

court for the prompt return of the property if the court does not confirm the acquisition; and
(e) the law entitles any claimant for compensation to apply to a competent court for the determination of—
(i) the existence, nature and value of their interest in the property concerned;
(ii) the legality of the deprivation; and
(iii) the amount of compensation to which they are entitled; and to apply to the court for an order directing the prompt payment of any compensation.
(4) Where a person has a vested or contingent right to the payment of a pension benefit, a law which provides for the extinction or diminution of that right is regarded, for the purposes of subsection (3), as a law providing for the compulsory acquisition of property.

It is important to pause and unpack the provisions relating to situations where deprivation of one's property rights can take place. In general terms, deprivation involves state interference with the private property rights of an individual or entity which has the possibility to result in economic loss to the rights holder.[218] Deprivation is loosely defined as regulatory measures that are placed by the state aimed at regulating the use of ones right without necessarily having the right taken away.[219] Gubbay CJ in *Davies and Others v Minister of Lands, Agriculture and Water*[220] highlighted deprivation as more of an attenuation or negative restriction of some rights that come with private ownership.

In accordance with section 71 (3), deprivation can only occur if it is sanctioned in terms of a law of general application. This requirement is also echoed in Section 86 of the Declaration Rights section that only in terms of a law of general application can the Declaration of Rights be limited. A law of general application is one that gives the state authorization to undertake a particular action generally and not arbitrary for it to meet the requirement. From a South African perspective, a law of general application, according to Woolman and Botha must pass the four-prolonged test of generality, non-arbitrariness, publicity and precision.[221] This approach might be useful to follow in Zimbabwe as well. In most instances, statutes and regulations meet this requirement which is also meant to protect against targeting certain races, ethnic groups and religions as echoed in the national founding values.[222] The Communal Land Act is one such law of general application which the Minister of lands whom through a statutory instrument actions the provisions. The courts in most instances would look closely to discern if such a law fulfils these requirements and in the event, the act does not fall within the legal requirements, the deprivation of the communities' communal land property rights would be ruled unlawful.[223]

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[218] AJ Van der Walt (See note 146: 345).
[219] *Hewlett v Minister of Finance and Another* 1981 ZLR 571 (SC);19821 SA 490 (ZC).
[220] 1996 (9) BCLR 1209 (ZS).
[221] S Woolman and H Botha 'limitations' in S Woolmans, T Roux and M bishop eds Constitutional Law Of South Africa (2013).
[222] The Constitution (see note 12:3).
[223] S Woolman (See note 221).

In the context of deprivation, the Constitution further elaborates what should be contained within the law of general application. The law must specify the rationale for the deprivation which can include interests of defence, public safety, public order, public morality, public, health or town and country planning; or developing the property for a purpose beneficial to the community.[224] The phrase beneficial to the community should be interpreted both narrowly to ensure legitimacy over the deprivation whilst also being broadly interpreted to ensure private transfers for the broader benefit. Developmental projects in mining and agriculture can effectively pass this test as their benefit may easily fit within the ambit of community benefit or country planning.

The progressive nature of the constitutional property clause is also evident by the requirement placed for communicating the decision resulting in deprivation by the authority within a reasonable time.[225] The interests of the communities over communal land entails that they should be adequately informed about the compulsory land acquisition by the state and the subsequent relocation prior to acquisition, during the acquisition and during the resettlement process. This requirement is commonly referred to as the requirement of publicity.[226] The major question that would, however, need to be discerned is the question of 'reasonable notice' which most communities allude is usually short. Coming to a decision of whether something falls within the spectrum of reasonableness always remains controversial grounds of review in administrative and constitutional cases and the test set up above will always apply. The determination of what is reasonable or unreasonable notice invariably will be taken in light of the substantive merits of the case.[227]

The common law position has changed especially now where courts look more closely to delegated legislation especially where it can lead to gratuitous interference with the rights of those subjects.[228] The courts are therefore now more open to looking at the notice period that an administrator gives especially 'if it is one that a reasonable decision-maker could not reach.'[229] Reasonableness will therefore in a constitutional democracy be weighted taking into account factors mentioned above as from the *Bato Star* case. The balancing of all these factors placed within a particular context would highlight that a one weeks' notice for communities to relocate so as to pave way for developmental projects

[224] The Constitution (see note 12:71 (3) (b)).
[225] Ibid; 71 (3) (c) (i).
[226] *Associated Newspapers of Zimbabwe (Private) Limited V The Minister of State for Information and Publicity and Others* (2005) ZWSC 105.
[227] A Pillay 'Reviewing reasonableness: An appropriate standard for evaluating state action and inaction' (2005) 122 *SALJ* 419, 425; C Hoexter *Administrative Law in South Africa* (2007) 293-294.
[228] *Kruse v Johnson [*1898] 2 QB 91.
[229] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC).

is grossly unreasonable. The notice period even given to a tenant is currently greater and inscribed in law.[230]

In cases where deprivation is provided by a law of general application, justifiable reasons for the deprivation leads to significant loss to the rights holder and if the notice period for such deprivation is meet, the next stage will be compensation. Section 71 (3) (c) (ii) provides a new overriding outline relating to compensation. Part V and VII of the Land Acquisition Act will now be interpreted and applied to the extent of its consistency, or lack of it, with the provisions of the Constitution and were necessary needing realignment. Compensation for violation of one's property rights should be 'fair and adequate…. [paid] before acquiring the property or within a reasonable time after the acquisition.'[231]

Having established that one has been deprived of his or her property for purposes of carrying out a national developmental project, the issue turns to the time and manner of such compensation should be paid. Section 71 (3) (c) (ii) states that the compensation has to be paid for the acquisition of the property or within a reasonable time. The same factors of reasonableness discussed above would apply to what time after acquisition of the property amounts to reasonable period. History dictates that the state has taken time to come up with a policy on compensating people whom would have been displaced by large-scale investment project.[232] In the same light communities from Marange were relocated to Marange after only getting USD$1000 as disturbance allowance and still waiting for their compensation.[233] The same issue affects communities from relocated to Chingwizi after the flooding of Tokwe-Mukosi dam[234] and those from Chisumbanje who were promised irrigation land as compensation for the establishment of green fuel project.[235] All these examples highlight the delay of the state in paying compensation in the past which in the constitutional era would be in violation of the Constitution.

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[230] Rent Regulations Statutory Instrument 32 of 2007 [sec 30 (2) (c)]. *Longman Zimbabwe (Pvt) Ltd. v Midzi and Others* (209/06) ((Pvt)) [2008] ZWSC 34 (11 March 2008).
[231] The Constitution (see note 12:71 (3) (c) (ii)).
[232] Hasard Number 44 Volume 43 of 2017, Wednesday 15 March 2017. The minister of Energy and Power Development was asked in parliament whether the government has the policy to compensate people in the context of those being displaced from Zambezi valley between to pave way for the construction of the Kariba dam, 1955-1958. The minister response was that there were ad-hoc projects that were being implemented by the trust fund that had been created by the entity operating the dam. This clearly shows the absence of such policy that can be used uniformly across the whole spectrum of development projects in Zimbabwe.
[233] Parliament of Zimbabwe Report on the Field Visit to Marange Diamond Fields and to Relocated Families in Arda Transau, by the Portfolio Committee on Mines and Energy, conducted from the 12th to the 14th of January 2017 available at http://www.zela.org/docs/marange.pdf (accessed on 14 March 2017).
[234] Zimbabwe Human Rights Commission (See note 20). US$9 million was needed to pay as full compensation to affected families 6 months late after the floods had affected the villagers and at the time of the investigation no amount had been distributed with the exception a US$2 million promised by the provincial administrator's office
[235] JM Wadyajena (See note 1).

The Constitution is clear when it comes to payment of compensation and this is not conditional on the profitability of the developmental project.[236] Profitability should never be allowed to be a defence to compensation as often cited by the development project establishers when questioned regarding commitments pledged. It is submitted that in cases where the state and an investment partner are not convinced of the profitability of the project, in the beginning, it provides greater reason that the decision was not reasonably reached and should not have been carried through or commenced. Compensation should, therefore, be paid to communities at the moment that land is sought to be acquired or before relocation as these communities has lower bargaining levels with the state. The principles of good governance and the rule of law should be the cornerstone to balancing the interests of the state, private companies and the communities' interests in the same land. This means that the only ideal scenario is that compensation is addressed before acquisition of the property rights. It is submitted that only in such cases can a fair result be attained. Budlender is of the view that what is fair should be just and equitable reflecting the contextual background and not based on an abstract value.[237] This in principle seeks to move away from the market value approach which is also cited as the basis why the land reform program was slow in Zimbabwe.

The role of the courts with regard to compensation is particularly also well spelt out in section 71 (3) (e). The court in reaching a determination as to compensation will have to take into account the nature and value of their interest in the property concerned; the legality of the deprivation; and the amount of compensation to which they are entitled.[238] Communities once having established that they have property rights expropriated when developmental projects were established can seek the court's assistance in relation to compensation whereupon an order directing the prompt payment of any compensation can be made.

Payment of compensation should not be considered only from a strictly monetary perspective. The view provided by Roux that compensation should not necessarily be in monetary terms is more appropriate in light of the fact that some concerns cannot be paid out a monetary value.[239] Compensation should be viewed within the broader spectrum of issues. The compensation value within the South Africa Constitution is decided to take into account the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the

[236] The Constitution (see note 12:71 (3)).
[237] G Budlender 'The Constitutional Protection of Property Rights' in G Budlender and T Roux *New Land Law* (1998) 57.
[238] Section 71 (3) (e) i-iii.
[239] T Roux 'Property' in S Woolman et al *Constitutional Law of South Africa* 2nd ed (2004) 1-37.

purpose of the expropriation.[240] These factors are vastly different to those applicable under the Zimbabwean Constitution. One major issue that the Zimbabwe Constitution does not take into account in determining the property value is the history of property use. The lack of consideration of this historical value and context makes all land open for developmental projects establishment regardless of the historical context, value and cultural aspirations of the present inhabitants. Furthermore, another downside of the property rights clause is the non-recognition of the market value of the land in question. This is an important consideration that is needed in order to arrive at a fair amount of compensation. Fair compensation will in most sincerity be one that seeks a balance between the interest of the affected communities as a result of the deprivation of their rights and the general public interest whilst taking into account all relevant circumstance such as those discussed above.

In all respects, section 71 of the Constitution is very substantive by including the definition, procedure in deprivation and process in getting redress towards protecting private property rights which include communal land.[241] This provision is in line with contemporary constitutions that take into account human rights and simultaneously respecting the doctrine of rule of law which include principles of natural justice, fairness and legality.[242] Courts are now given the mandate to enforce the application and content of section 71 in cases were deprivation would have been established and order fair compensation to be paid, a position which is different to that in South Africa. In South Africa, deprivation and expropriations are different mechanisms that result is different results. Compensation is only paid in cases of expropriations and in cases of deprivations, it would not warrant compensation as one's rights are not extinguished but rather just limited.[243]

3.5 Redress Mechanisms

3.5.1 The Zimbabwe Land Commission

The Constitution has other provisions that can be used to advance the rights of communities residing on communal lands. One institution that can swiftly address land disputes and created by the Constitution is the Zimbabwe Land Commission (ZLC).[244]

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[240] The South African Constitution Act 28 of 1996; Section 25 (3) a-e.
[241] The Constitution (see note 12:72). The definition of agricultural land excludes communal land.
[242] J Tsabora (See note 208).
[243] *First National Bank of SA t/a Wesbank v Commissioner, South African Revenue Service* 2002 (4) SA 768 CC. The Constitutional Court defined deprivation as 'any interference with the use, enjoyment or exploitation of private property' the state interference by any means in the property of an individual amount to deprivation where-as expropriation is a subset of deprivation. AJ van der Walt 'The limits of constitutional property' *South African Public Law* (1997) 279.
[244] The Constitution (see note 12:296).

The Zimbabwe Land Commission though not specifically included within the ambit of other Chapter 12 on Independent Commissions can provide recommendations of land tenure systems which include customary tenure.[245] The ZLC was established in order: [246]

> (a) to ensure accountability, fairness and transparency in the administration of agricultural land that is vested in the State;
> (b) to conduct periodical audits of agricultural land;
> (c) to make recommendations to the Government regarding
> (i) the acquisition of private land for public purposes;
> (ii) equitable access to and holding and occupation of agricultural land, in particular—
> A. the elimination of all forms of unfair discrimination, particularly gender discrimination;
> B. the enforcement of any law restricting the amount of agricultural land that may be held by any person or household;
> (iii) land usage and the size of agricultural land holdings;
> (iv) the simplification of the acquisition and transfer of rights in land;
> (v) *systems of land tenure; and*
> (vi) fair compensation payable under any law for agricultural land and improvements that have been compulsorily acquired;
> (vii) allocations and alienations of agricultural land;
> (d) to investigate and determine complaints and disputes regarding the supervision, administration and allocation of agricultural land. [own emphasis]

The core mandate of the Zimbabwe Land Commission is specifically restricted to deal with matters related to agricultural land. The commission can make recommendations that have implications on communities' land rights.[247] Some of the recommendations that the ZLC may be able to provide can include matters relating to the identification of property rights under customary tenure. Further, the ZLC makes recommendations on the provision of title deeds that would identify freehold land tenure and can submit such to the government.[248]

3.5.2 Zimbabwe Human Rights Commission

The Constitution of Zimbabwe has created separate Chapter 12 Independent institutions that are meant to advance democracy such as the Zimbabwe Human Rights Commission (ZHRC).[249] Independent institutions are increasing now being established and included in constitutions as opposed to them being established under statute in a bit to increase

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[245] Ibid, 233. Commissions established in Chapter 12 of the constitution are meant to advance, promote, protect, fulfil the respect of human rights by both natural, juristic and arms of government without fear of being dissolved. A E Pohjololainen *'The Evolution of National Human Rights Institutions: The Role of the United Nations' The Danish Institute for Human Rights* (2006) 7.
[246] The Constitution (see note 12:297).
[247] Communities residing on communal land falls within the ambit of the definition of a lawful holder or occupier and therefore once the ZLC is established would be able to approach the commission in a bid to have their grievances addressed.
[248] The Constitution (see note 12:297 (c) (v)).
[249] Ibid; 242.

their independence and duration. General Comment No.10 of the United Nations Economic and Social Council recognizes the important role that institutions such as the ZHRC can play in the promotion and respect of human rights.[250] The functions of the ZHRC include:

> (a) to promote awareness of and respect for human rights and freedoms at all levels of society;
> (b) to promote the protection, development and attainment of human rights and freedoms;
> (c) to monitor, assess and ensure observance of human rights and freedoms;
> (d) to receive and consider complaints from the public and to take such action in regard to the complaints as the Commission considers appropriate;
> (e) to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions;
> (f) to investigate the conduct of any authority or person, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by that authority or person; and
> (g) to secure appropriate redress, including recommending the prosecution of offenders, where human rights or freedoms have been violated.[251]

Included within the mandate falling under the ZHRC is protecting the public against abuse of power and maladministration by state institutions.[252] Communities in some instances are not in a position to institute legal action to protect their own rights enshrined in the Declaration of Rights and the mandate of ZHRC becomes more imperative in such cases. The current developmental trajectory of PPPs gives more power on the state and the institutions upon which the communities find themselves in a weaker position. Communities whose property rights would have been violated could, therefore, approach the ZHRC for 'appropriate redress'. Appropriate redress is in some instances personal and in other cases broader than the claimant. The court in *Mahambehlala v Minister of the Executive Council for Welfare, Eastern Cape and another* noted that

> In the determination of appropriate relief, it is important to bear in mind that, although constitutional remedies will often be forward-looking to ensure that the future exercise of public power is in accordance with the principle of legality . . . Moreover, in my respectful view, in order to vindicate the Constitution one should have regard to the basic values and principles enshrined therein. In this regard section, 195(1) of the Constitution is of importance. It provides that public administration should be governed by the democratic values and principles enshrined in the Constitution, including the maintenance of the high standard of professional ethics, the provision of services impartially, fairly, equitably and without bias, and the necessity to respond to the needs of the people. Bearing in mind the observation of Kriegler J in Fose's case . . . *that appropriate relief means that which is*

[250] United Nations Economic and Social Council. *Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Right. Draft General Comment No.10. The role of National Human Rights Institutions in the protection of economic, social and cultural rights* (1998) 2.
[251] The Constitution (see note 12:243).
[252] Zimbabwe Human Rights Commission Act (Chapter 10:30).

> *'specifically fitted or suitable', it seems to me that it would be just and equitable for an aggrieved person in the position of the applicant to be placed in the same position which she would have been had her fundamental right to lawful and reasonable administrative action not been unreasonably delayed, and that relief placing her in such a position would be appropriate as envisaged by the Constitution .*[253]

The ZHRC is thus one important institution that has the ability to come up with remedies best suited to protect communities land rights. A case in point in which communities' rights to land was undertaken by the ZHRC is the one between *Arnold Farm Residents and Others*.[254] In this case, the ZHRC made significant findings which set a precedent on how future relocation exercises should be done. The report stated that the relocation exercise prejudiced the families as there was no valuation conducted of affected families' homes. Further, payment of compensation for the establishment of new homes was made and absence of official documents identifying the new homes as an anomaly. This is the same case with families that have been resettled in Arda Transau who to date have no documents transferring ownership.[255] These situations create despondency, constant human rights violations and potential future relocations largely as a result of insecure tenure.[256] Resettled communities thus will live in constant poverty due to diminished investment efforts on the land concerned.

3.5.3 Zimbabwe Gender Commission

The establishment of developmental projects and subsequent loss of communities' property land rights affects women, youths, and people living with disabilities, elderly and children more than any other sector of the society. One institution that has been established to protect their rights is the Zimbabwe Gender Commission (ZGC). The ZGC can assist all persons irrespective of their gender, on issues of access to land, and destroy patriarchal fault lines that gave access to males only especially under the customary land tenure. Under the customary tenure, women access to land through the male household heads, a situation that the ZGC can aid in addressing.[257] Notably, the ZGC can monitor issues concerning gender equality, undertake gender-related investigations, conduct research into issues relating to gender and social justice, and recommend changes to laws and practices which lead to discrimination based on gender; secure appropriate redress where rights relating to gender have been violated; and do everything necessary to promote gender equality.[258] It is evident that the ZGC and the 2013 Constitution intend

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[253] *Mahambehlala v Minister of the Executive Council for Welfare, Eastern Cape and another* 2002 (1) SA 342 (SE).355J – 356D [Own emphasis].
[254] Zimbabwe Human Rights Commission 'Arnold Farm Residents and Valeria Farm Residents and Zimbabwe Republic Police and Ministry of Lands and Rural Resettlement' available at http://www.zhrc.org.zw/download/2017-mazowe-arnold-farm-report/ (Accessed: 19 September 2017).
[255] Ibid, 16.
[256] 'Artisanal gold miners descend on Arda Transau' *Business Daily* 7 September 2017.
[257] E Sithole (See note 108).
[258] The Constitution (see note 12: 246).

to chart a new course to ensure equitable and fair access to land irrespective of gender. That done, the rights of women to land are given greater recognition, enjoy similar or equal protection as men's rights to access to land.

3.5.4 Land Acquisition and Public Administration

The acquisition of communal land by the state will also be weighed in accordance with the principles of Public Administration in the Constitution. Section 194(1) states that Public Administration in all tiers of government must be governed by democratic values and principles including that includes the participation of the public in policymaking. The principle of public administration ensures that government agencies are both accountable to parliament and the people. Further, decisions made can be challenged through the court process. The Constitution progressively clarifies who can approach the courts seeking resource and specifies the type of relief that one may be given by the courts. The various issues that communities can seek the courts' intervention in a bid to strengthen their land rights may include the right to information and issue of fair and adequate compensation based on statutory or constitutional grounds.

3.5.5 Litigation and Locus Standi

In most instances, unless one has a direct interest in the outcome of the judgement, the courts were not willing to hear the case. This requirement barred many public interest litigants to be able to bring cases before the courts in the interests of the communities.[259] The Constitution has however progressively noted the previous inhibition and various categories of parties are now to be able to bring cases before the courts.[260] Section 85 of the Constitution now allows one to approach a court, alleging the infringement or likelihood of infringement to which the court can grant 'appropriate relief, including a declaration of rights and an award of compensation.' The categories of people that can approach the courts include [261]

(a) any person acting in their own interests
(b) any person on behalf of another person who cannot act for themselves;
(c) any person acting as a member; or in the interests, of a group of class of persons
(d) any person acting in the public interests
(e) any association acting in the interests of its members

[259] T Dhlakama 'The role of the common-law interdict in enforcing environmental compliance through public interest environmental litigation in South Africa: (unpublished LLM thesis, University of KwaZulu Natal: 2014)

[260] In some instances, some scholars were against the expanded locus standing position on the belief that it would open the floodgates of public interest litigation cases. However, there are a number of factors that still inhibit the huge numbers. M Dhliwayo 'A Critical Examination of The Scope, Content and Extent of Environmental Rights in The Constitution of Zimbabwe (unpublished LLM thesis, Midlands State University: 2016).

[261]The Constitution (see note 12:85).

The expanded locus standi provisions should be a welcome development especially to entities that may want to enforce communities' rights on their behalf. Public interest organization like the Zimbabwe Environmental Law Association (ZELA) in the past faced challenges in satisfying the locus standi requirement when it sought to protect community rights interests.[262] The constitutional provisions on access to the courts are one that can ensure adequate protection of statutory and constitutional rights of the broader populace rather than individuals.

The Constitution allows the court to grant 'appropriate relief' not limited to the immediate party to the action but which can have spillover effects to the broader society.[263] In this instance, it would be one that is 'specifically fitted or suitable…just and equitable' which would be able to put the communities in a similar position that they would have had, had there not been a deprivation of their land or expropriated.[264] Leach J in *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* stated that:

> the range of remedies from which such relief could be selected was not restricted to existing common-law remedies…I have no doubt that this court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context, an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.[265]

Appropriate relief in the context of communal property will in most instance be one that would ensure that the EESCRs of the communities are protected considering the development stage and where the communities have been relocated. It is therefore prudent that as developmental projects are being conceptualized, the EESCRs of the communities are considered.

3.5.6 Interpretation and limitation of property land right

Section 71 of the Constitution provides substantive and procedural rights that are applicable to the understanding of the contents of the right. The section needs to be interpreted in conjunction with section 46 of the Constitution which applies to the interpretation of all rights within the declaration of rights section. In the interpretation of section 71:

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[262] *Malvern Mudiwa* (see note 175).
[263] T Dhlakama (See note 260).
[264] *Mahambehlala* (see note 253).
[265] 2004 (2) SA 393 (E).

> a court, tribunal, forum or body—
> (a) must give full effect to the rights and freedoms enshrined in this Chapter;
> (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;
> (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
> (d) must pay due regard to all the provisions of this Constitution, in particular, the principles and objectives set out in Chapter 2; and
> (e) may consider relevant foreign law.

The courts have always been clear that in the interpretation of rights within the Declaration of Rights section of the Constitution, broader interpretation is to be adopted as opposed to a narrower approach. This was evident in the Supreme court case of *Smyth v Ushewokunze and Another* where the court stated that: [266]

> In arriving at the proper meaning and content of the right guaranteed by (the Declaration of Rights), it must not be overlooked that is is a right designed to secure a protection, and that the endeavor of the court should always be to expand the reach of the fundamental right rather than to attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to letter of the provision; one takes full account of changing conditions, social norms and values so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people.

This is an important decision that sets precedence on how constitutionally enshrined human rights should be interpreted irrespective of the case being decided in the context of the previous Lancaster House Constitution. A broader understanding of the property right provision is to be advanced over and beyond a restrictive interpretation. This is more important in the context that the property rights clause has internal limitations on provisions which apply beyond the provisions of section 86, that is the general limitation provision.

Section 86 of the Constitution is the overall Declaration of Right limitation provision that highlights the instances upon which rights can be limited. In interpreting this section, one should take note that only absolute rights in the Constitution include the right to life, human dignity, slavery and torture with the rest including the property right subjected to limitations.[267] Nevertheless, for the property right to be limited by section 86, certain preconditions must be fulfilled. Firstly, the limitation must be provided by a law of general application and the limitation must be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. The law itself will also be weighed taking into account all relevant factors, including - (a) the

[266] 1997 2 ZLR 544 (SC).
[267] *Zimbabwe Lawyers for Human Rights and The Legal Resources Foundation V The President of the Republic of Zimbabwe and the Attorney-General* SC 12/03, 7. The court indicated rights provided for in the Constitution are indeed protect but such protection does not render them absolute rights.

nature of the right or freedom concerned; (b) the purpose of the limitation, in particular whether it is necessary in the interests of defense, public safety, public order, public morality, public health, regional or town planning or the general public interest; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others; (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and (f) whether there are any less restrictive means of achieving the purpose of the limitation.

The founding values and objectives in the Constitution are consequently equally important in guiding the courts' application of the law. Constitutional law interpretation in Zimbabwe has largely been embodied as a purposive approach that rather expands than restricts the manner or content of the right. In the scenario of developmental projects on communal land, a balance will have to be taken into account between the competing interests so as to ensure that neither the state nor its developmental partners are seen to possess superior property rights protection. The courts will also not take into account the limitations of rights within the declaration of rights at face value. It will be important to learn how the property rights clause will be interpreted by the courts under this constitutional framework.

3.7 Conclusion

Zimbabwe has a plethora of legislation that has a bearing on communal land where most communities reside. These include the Traditional Leaders Act, Rural District Councils Act, Mines and Mineral Act and The Environmental Management Act. The Communal Land Act and the Land Acquisition Act are the main pieces of legislation with a direct bearing on communities residing under customary land tenure system. The law has remained the same and constantly applied as it has been since the pre-2013 constitutional era. The application of the law has constantly reiterated communities having *usufruct rights* whereas ownership rights rest with the state. Increasingly, in an era where development projects are being established by private entities in partnership with the government, the state's role in protecting the interests of the communities is becoming blurred.

The Constitution offers greater opportunities for the protection and interpretation of the *usufruct rights*. *Usufruct rights* provided both under contract and statute should now be equally protected by the property clause and certain procedures followed. Developmental projects inevitably deprive communities of their land and in the end lead to the expropriation of the land to the detriment of the communities residing on such land. As such, the affected communities must be given reasonable time and notice, fair and adequate compensation for their property developments irrespective of the fact that they

do not own the land. In instances of disputes emanating from the state, developer and community, the community members themselves have the capacity to approach the court of law, commissions established by the Constitution and with the support of public interest organizations seek protection against violation of such rights in the courts of law.

The ultimate objective of the Constitution is to ensure that every citizen enjoys equal benefits considering the constitutional provisions. Accordingly, customary land tenure though not recognized under the Deed Registries Act should be equally protected. In a nutshell, private land ownership as one of the tenure systems that exists is not the only mechanisms that can be applied to ensure that communities residing on communal land have tenure security. Tenure security may result from an overhaul of the current laws regulating property rights or by developing and using a mix of current existing legislation to ensure that security of tenure is attained.

The following chapter will look at other jurisprudence, how they have managed to address similar challenges that were faced by communities residing on communal lands. Important lessons that can be drawn from such a comparative analysis will be made taking into consideration international developments as well as ensuring that customary tenure is not arbitrarily revoked in the wake of developmental projects in Zimbabwe.

CHAPTER FOUR: COMPARATIVE ANALYSIS OF REGIONAL AND INTERNATIONAL REGULATORY AND INSTITUTIONAL FRAMEWORKS ON COMMUNAL LAND RIGHTS

4.1 Introduction

Chapter Three critically examined the various legislative mechanisms and provisions that can be used by communities in Zimbabwe to protect their land rights in the context of developmental projects being established. These mechanisms include utilising the environmental consultation process, broad understanding of the constitutional property rights clause, approaching constitutionally established commissions and the courts of law. This chapter seeks to broaden the discussion of community rights to land by focusing on the relevant approaches from regional jurisdictions and relevant international principles in confronting community land tenure issues and the threat posed by developmental projects.

A comparative analysis of the protection of property rights within other regional African jurisdictions is imperative given the common background of how communal land rights were protected under colonialism and now within a post-colonial constitutional era. The comparison can, therefore, unveil important lessons which can guide Zimbabwe in establishing, developing, interpreting and protecting the rights of communities in the wake of developmental projects being conducted on communal lands. Furthermore, principles and interpretations of the law from other jurisdictions will have a bearing on how the Zimbabwean judiciary is likely to interpret the property rights clause when approached to enforce such rights in courts.

The Constitution of Zimbabwe makes it clear that in interpreting the Declaration of Rights, considerations can be made to foreign law and international law.[268] Comparative analysis of other jurisdictions and international law provisions is therefore essential in providing context and direction towards protecting communities' rights especially as the constitutional property rights clause jurisprudence is being developed. In light of this, a comparative analysis of the South African jurisprudence, the African Charter and the international principles in a bid to strengthen communal land rights will be done.

4.2 South African Constitution and Communal Land Rights

The South African Constitution is quite similar in many ways to the Zimbabwean Constitution, the property rights clause. Both South Africa and Zimbabwe's Constitutions recognizes the past injustices that prevailed under colonization in relation to land ownership and therefore seeks to break away from the past through promoting equity and

[268] The Constitution (see note 12: 46 (1) (a) (b)).

economic transition without advancing racial tensions.[269] South Africa's Constitution and the Constitutional Court being older than Zimbabwe's Constitution can provide important persuasive precedence on how to understand the property rights clause in a way to strengthen communities land rights. Furthermore, South Africa has enacted various legislation that seeks to delicately ensures secure land tenure for all South African especially those that resided on land that was insecure because of previous racial laws. On the same note, the South Africa Constitutional Court has progressively been reconfiguring tenure security issues grounded in common law through judicial interpretations that are based on justice and equity.[270] In particular, the spirit and purport behind section 25 seek of the South African Constitution is to redress past social imbalances whilst providing equal protection to everyone's rights is therefore important.

Section 25 of the South African Constitution provides that:

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of the law of general application—

a) for a public purpose or in the public interest; and
b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

a) the current use of the property;
b) the history of the acquisition and use of the property;
c) the market value of the property;
d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
e) the purpose of the expropriation.

4. For the purposes of this section—

a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
b) property is not limited to land.

5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress

[269] Both Zimbabwe and South Africa Constitutions have the equality and non-discrimination clause that see to provide equal benefits to every citizen regardless of race, colour, tribe, sex, gender amongst others.
[270] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Government of the Republic of South Africa and Others V Grootboom and Others* 2001 (1) SA 46 (CC).

Section 25 (1) was previously literally understood as a provision that sought to protect the institution of private property ownership.[271] The dynamics in understanding the interpretation of this constitutional provision has changed. The Constitution recognizes property in a much broader and inclusive context than that which applied under private law.[272] The understanding of what property entails has progressively been broadened each time so as to 'promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3.'[273] In all essence, property rights including private property ownership rights and subsidiary rights to ownership are equally constitutionally protected. One can apply and enforce the various remedies which would be accorded to an owner of private property.

It is important to note that the South African Constitution takes cognizant of the insecure nature of property rights that communities previously encountered under colonialism. Section 25 (6) specifically makes it imperative upon parliament to address the 'laws and practices' that made security of tenure of communities insecure. This issue was seriously taken into account by the South Africa government by enacting a number of pieces of legislation applicable in sector-specific areas. These legislations included the Communal Property Associations Act,[274] Interim Protection of Informal Land Rights Act,[275] the Land Reform Act[276] and the Extension of Security of Tenure Act[277] and the Communal Land Rights Act (CLARA).[278] All these legislations were aimed at giving effect to section 25 (6) of the Constitution.

The Communal Land Rights Act enacted was the primary legislation enacted to address the previous position in which communal land was deemed insecure and redress the past colonial legacy. CLARA was however declared unconstitutional in the case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others.*[279] The objective of CLARA was to fulfil section 25(6) and 25(9) constitutional provisions by transforming 'old order' insecure rights into 'new order' secure rights.[280] In effect, CLARA made it possible

[271] H Mostert and A Pope (eds) *The Principles of the Law of Property in South Africa* (2010) 119–120
[272] Ibid.
[273] The Constitution (see note 12: 46 (1) (a).
[274] The South African Constitution.
[275] Act 31 of 1996.
[276] Act 3 of 1996.
[277] Act 62 0f 1997.
[278] Act 11 of 2004.The challenges and weakness within this act are beyond the scope of this study.
[279] 2010 (6) SA 214 (CC) the constitutional court declared the whole CLARA unconstitutional as it had not followed the correct procedure in its enactment. CLARA was passed following section 75 constitutional procedures which related to Bills which do not affect the provinces. CLARA impacted directly on provincial matters together with indigenous as customary rules and as such was supposed to have followed section 76 constitutional procedures.
[280] JM Pienaar 'Tenure reform in South Africa: Overview and challenges' *Speculum Juris* 25 (2011) 108-133.

for communities to have the land registered in the communities or individual name who held or occupied communal land. The actions by the legislature in seeking to give effect to the constitutional provisions as a means to attain more secure land tenure system should, however, be commended. This is despite the means of elevating customary rights having been questioned.[281]

South Africa has not looked at addressing the insecurity of land rights through legislative means only but the courts have sought to progressively interpret customary law. The South African courts have on a couple of occasions been presented with an opportunity to interpret customary property rights in the context of constitutional provisions. One such case is *Alexkor Ltd v The Richtersveld Community*.[282] In this particular case, the court had to decide on an issue where a community had been driven away from a narrow strip of diamondiferous land after diamonds were discovered. Alexkor Ltd, a state-owned diamond-mining company had been granted mining rights over the land where the community had 'exclusive beneficial occupation' since the mid-1920s. In reaching the judgement on this communal land rights case, the court took cognizant of the fact that the community had previously had the exclusive right to occupation and use of the land such as water, land for grazing and exploit natural resources. This situation was akin to right of ownership under indigenous laws. As such, the community had a right over the land in question.[283] This case is particularly important as it places customary land tenure within the modern era where even the Constitution recognises customary law as forming part of the nation's legal system.

Additionally, in seeking to protect the rights of communities residing on communal land, other constitutional provisions not particularly linked to property rights have been progressively interpreted by the court. These provisions include the rights to adequate housing which is provided for in section 26 of the Constitution. The right to adequate housing is especially significant in ensuring communal land tenure security. The right implies that one's place of residence should be protected and in most instances, a home is linked to land. It, therefore, means that failure to secure one's housing affects their land tenure security.

Section 26 of the South African Constitution further seeks to ensure that everyone has access to adequate housing facilities and protects anyone from being arbitrary evicted from their homes.[284] The eviction of one person from their home can only be undertaken with the permission of the courts which will take into account all relevant circumstances before granting an eviction order.[285] This constitutional provision makes it particularly

[281] A Pope (See note 57).
[282] 2004 (5) SA460 (CC).
[283] Ibid, para 62.
[284] I Currie and J De Waal *The Bill of Rights Handbook* 5th ed (2005) 587.
[285] The South African Constitution (see note 240:26(3).

imperative to protect communities' rights even in the event that the owner of the land seeks to take over control of the 'thing' concerned. The state is therefore precluded from summarily calling for the community to "pack and leave" their homes as all considerations such as notice and alternative accommodation will be taken into account by the court. The state as private citizens must equally apply to the court for an eviction order. In such a case, the courts will have to take into account the rights of the communities concerned. Section 26(3) effectively strengthens the tenure rights of communities as it reinforces their housing rights by preventing arbitrary evictions.

A case in point that the Constitutional Court had to interpret the meaning of section 26 (3) was that of *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd*[286] and *Government of the Republic of South Africa and Others v Grootboom and Others.*[287] In both cases, the courts confirmed that the state had a duty to respect the people's rights to housing and no program or project even beneficial to the community could be done in violation of such rights. These judgments highlight the consideration of immediate communities' rights which governments should recognize irrespective of the people only having 'usufruct' rights and ownership rights vested with the state. The state is effectively mandated to uphold the constitutional provisions and cannot segregate against those who do not have 'superior' rights.

Advancing community land rights is not merely limited to property and housing rights but also extends to the right to information. In the recent case of *Bengwenyama Minerals (Pty) Ltd and Community v Genorah Resources (Pty) Ltd*[288] the court highlighted the importance of consulting the community even before an anticipated project could commence in terms of the Minerals and Petroleum Resources Development Act (MRDPA).[289] In this case, Genorah Resources had been given prospecting rights on a piece of land to which the community had been residing on for more than a century and had mining interests in the area concerned. Further, section 16(4) of the MRPDA required that any individual that seeks to undertake mining activities had to consult the landowner and the lawful occupier and other interested parties. In this case, it was observed that Genorah Resources did not consult the community concerned. As such, this defeated the purpose of the Act that seeks to protect the environmental and socio-economic needs of people directly or indirectly impacted by the prospecting rights.[290] The community subsequently submitted a written objection to the process followed by Genorah Resources citing that it had not been consulted. This is despite the fact the Genorah Resources had been granted by the department. The Constitutional Court held that the

[286] *Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).
[287] 2001 (1) SA 46 (CC).
[288] 2011 (4) SA 113 (CC).
[289] Chapter 28 of 2002.
[290] Ibid.

community had not been properly consulted in terms of the MPRDA. The court also held that the Department of Mineral Resources had not given the community a hearing despite the community being an important constitutional tenant. The rulings in these two cases highlight that procedural mechanisms are another important manner which provides opportunities to strengthen communities' rights to the land concerned.

It is commendable that constitutional principles and legislative enactments are now being taken seriously in Zimbabwe. A case in point is that the Zimbabwe Consolidated Diamond Company (ZCDC) should be commended for respecting courts judgments and seeking to comply with procedural requirements provided under the Environmental Management Act. Such behaviour had not been sufficiently followed to the later by former diamond mining companies in Marange.[291]

4.3 Is titling communal land the answer to securing communal land rights in Zimbabwe?

Over the years, private property rights have been regarded as the most secure means of securing land rights when compared to all other forms of land tenure systems. This stance has been taken by some academics who regard private land rights as the best means to attain economic development through access to loans.[292] Titling has also been advocated due to the terminology used in property law that tend to favour 'formal', 'statutory' and legal tenure over and above what is termed 'informal', 'customary' or 'illegal arrangements.[293] However, this argument has been criticized by other scholars who argue that in other African countries were titling has been piloted, it had failed to meet its objectives and expected outcomes.[294] To people residing under communal land tenure, 'access to land is not *critical* for wealth production. Land is regarded as critical for providing a secure home.'[295] This has led to people questioning the rationale of preferring private property rights to secure community land rights.[296]

Upgrading customary land tenure rights through titling system is arguably an ineffective manner of increasing tenure security for the less privileged and vulnerable sectors in the community. In most instances, the titling process is 'captured' by the elites at the expense

[291] *Marange Development Trust* (see note 109).
[292] M Tehan 'Customary tenure, communal titles and sustainability' in L Godden and M Tehan (eds) *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (2010) 355.
[293] D Hornby, I Royston R Kingwill and B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017).
[294] J Bruce, S Migot-Adholla and J Atherton 'The findings and their policy implications: Institutional adaptation or replacement?' in J Bruce and S Migot-Adholla (eds) *Searching for land tenure security in Africa* (1994); J Platteau 'Reforming land rights in sub-Saharan Africa: Issues of efficiency and equity' *United Nations Research Institute for Social Development* (1995).
[295] A Pope (See note 57:325)
[296] Ibid.

of the vulnerable categories especially women.[297] Moreover, the basis of the titling route is that private land ownership is used as a means of financing housing and business developments which ultimately result investing such rights in private entities in the end. Kenya, for example, took the titling route as a means of securing customary tenure rights of communities by providing title deeds in the names of individuals.[298] The process, however, brought unanticipated consequences noted by land concentrations, agriculture income inequalities, rural-urban migration and elite capture at the expense of the poor.[299] These lessons from Kenya should be able to guide other nations not to look at the provision of title deeds to land as the ultimate solution in securing communities' rights to land.

Titling as a means of securing one's property through a deeds registration system is furthermore completely different to the one which governs customary land tenure. Customary land tenure recognizes everyone's rights to land which should be balanced against social groups' obligations. There is a growing trend recognizing that securing communal land systems can best be achieved where the dynamics of customary land tenure systems are recognized and supported.[300] Indigenous norms and structures have continued to operate regardless of them being recognized by 'law' through a set of social and cultural facts that can provide an environment upon which state law can operate.[301] Seeking to change the existing system may lead to boundary disputes with adjacent communities as it will need boundary demarcations.[302] The Communal Land Rights Act[303] of South Africa was also severely criticized on the basis that it superimposed western constructs of absolute and exclusive land rights on an African system that is relative and has 'nested' rights.'[304] In light of this prevailing criticism of seeking to fit customary land tenure within 'the edifice,' the Rukuni Commission in Zimbabwe suggested the means upon which these two different systems can co-exist. The commission correctly highlighted that:

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[297] A Claassens 'Women, customary law and discrimination: The impact of the Communal Land Rights Act' *Acta Juridica* 1 (2005) 42 – 81.
[298] PK Mbote… et al *Ours by Right: Law; Politics and Realities of Community Property In Kenya* (2013) 104-109
[299] Ibid.
[300] D Hornby (See note 293:128).
[301] H Okoth-Ogendo 'The tragic African commons: A century of expropriation, suppression and subversion' *PLAAS* 24 (2002).
[302] A Claassens (See note 297:63).
[303] Communal Land Rights Act (see note 278).
[304] P Dhliwayo 'Tenure security in relation to farmland' (unpublished LLM thesis, Stellenbosch University: 2012) 122.

> Ultimately, and in the abstract, there is no tenure system that is good or bad, right or wrong but rather that any tenure system has to be secure, appropriate, and able to facilitate the needs of a community or society.[305]

Given the arguments against titling, there is a strong foundation upon which private property rights can co-exist alongside customary land tenure. The Constitution also recognizes the co-existence that can occur between these two different systems of land tenure and gives them equal protection of the law. This can be noted from Section 293 of the Constitution which allows the state to transfer ownership of land through selling, leasing and more importantly giving use and occupation rights. The use and occupation rights that the Constitution speaks to in relation to agricultural land is in line with the models of tenure that came from the FTLRP.

There is a clear identification of the fact that the hierarchical structure of rights that elevate ownership over and beyond other rights is not an ideal means of identifying property rights. Use and occupation rights can equally secure one's tenure, a system that already existed within communities under customary land tenure.[306] Tsabora opined that a 'fragmented rights' system is the best-suited model that can be adopted by the government as it will not result in ownership being the alpha of the property rights system.[307] Further, a fragmented system would result in a wide range of other rights being compared to each other and protected on their own basis without one being noted as being superior, weaker or stronger.[308] In order for this to operate, there is need for a legislative enactment that provides for the registration of occupation and uses rights albeit as limited real rights which are protected through a reformed cadastral system.[309]

The alternative suggested by Tsabora would also address fears of imposing customary land tenure within the current private property rights system that operates within a different context. The difference between these two systems does not mean inferiority as these property rights systems can be equally respected since they will be provided for by the same law with different origins. Pope reaffirms this view as he indicates that[310]

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[305] M Rukuni 'Why land tenure security in Africa is central to land reform and community-based governance, economic and social progress' in M Munyuki-Hungwe (ed) Land Reform and Tenure in Southern Africa: Current Practices, Alternatives and Prospects. (2004) 15.

[306] J Tsabora (See note 209:). He is of the opinion that since the definition of 'occupiers of agricultural land' is not defined in the Constitution, Section 3 (1) of the Rural Occupiers (Protection from Eviction) Act 20:26 definition may apply in this case which would include the communities residing on communal land. A 'protected occupier' as one whom occupies land without permission and would still require legal proceedings for eviction.

[307] Ibid.

[308] AJ van der Walt (ed) Land Reform and the Future of Landownership in South Africa (1991).

[309] DL Carey Miller and A Pope "South African land reform" *Journal of African Law* 44 (2000) 167. The registration system must provide for a simplified certificate of title that rights holders may then use to access forms of assistance

[310] A Pope (See note 57:322).

> If, in the envisaged unitary system, overlapping or layered indigenous rights are registered and thus 'fixed', as it were, the very nature of the indigenous-law land rights system will be affected. The reason lies in the fundamentally different points of departure from which people gain access to common-law property rights, on the one hand, and indigenous law land rights, on the other.

The argument, therefore, that communal land can be secured through providing title deeds to the communities is in itself not a remedy. Communities have their own mechanisms to address areas of discontent through dialogue, sharing information, consultations and consensus building which the governments have to respect before utilising their powers of eminent domain.[311]

4.4 International principals and conventions

Zimbabwe is a signatory to several international instruments that have a bearing on the actions that happen within the country's borders. International law has a part in the application and interpretation of the Constitution and local laws and policies. Section 46 of the Constitution of Zimbabwe recognises the role and place of international law in the interpretation of the Declaration of Rights. In the interpretation of the Declaration of Rights, 'a court, tribunal, forum or body…. must take into account international law and all treaties and conventions to which Zimbabwe is a party'.[312] This section should be read in light of section 165 (7) which places a mandate on members of the judiciary to acquaint themselves with domestic and international legal developments.[313] The importance of International law in Zimbabwe can therefore not be overemphasized not only within the judiciary circles but by all institutions of government. It would, therefore, be amiss for the courts to apply and interpret local legislation and or policies in a manner that is contrary to international law to which Zimbabwe is a party.[314] International law offers standards that can be used in the interpretation and application of cases involving communal land rights and in the process ensuring their adequate protection.

One important international convention that has a strong bearing on community land rights is the Universal Declaration of Human Rights (UDHR). Article 17 of UDHR is an international human rights provision concerning property rights.[315] This provision, read together with article 25(1) indicates the need to protect the right of communities over their

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311 T Cousins (See note 71: 157).

312 The Constitution (see note 12: 46 (1) (c)).

313 Members of the judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular, must keep themselves abreast of developments in domestic and international law.

314 The Constitution (see note 12: 326 (2)).

315 United Nations General Assembly 'Universal Declaration of Human Rights' Resolution 217 A (III) of 10 December 1948 UN Doc A/810. Article 17(1) of the UDHR states that no one shall be arbitrarily deprived of his or her property.

land.[316] The Zimbabwean Constitution also directly makes reference to the need to protect the housing facilities of its citizens by protecting citizens from arbitrary evictions.[317] Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) gives more clarity to General Comment No 4. The ICESCR highlights that the right to housing takes many forms and is not limited to parties who have ownership rights and it protects against forced evictions and or harassment.[318] The right to housing is, therefore, wider including one's peace and dignity. The courts will, therefore, be able to assess government or private actions in the application with the rights of other citizens. The Zimbabwean courts have been clear that it will not accept the arbitrary eviction of communities without following the legal provisions.[319]

4.5 Regional understanding of community land rights

Security of tenure of communities is increasingly becoming an issue on the agenda of many African constitutional democracies and not limited to the Southern African region. The broad continental challenge in ensuring security of tenure of communities requires that consideration is given to the broad perspective in ensuring that such vulnerable communities' land use rights are not further violated by the state and its strong business partners. This is envisaged in the African Commission for Human and Peoples' Rights (ACHPR) that seeks to ensure the protection of communities' rights to land. The ACHPR provides opportunities upon which communities can protect their land rights given that the SADC tribunal will now only be able to hear cases between nations.[320]

A typical case that the ACHPR decided in relation to community land rights was in 2010 involving the Endorois community from Kenya in *Centre for Minority Rights Development (CEMIRIDE) v Kenya*[321]. The applicants challenged the action of the state in converting the Endorois community land to a game reserve as such action had consequently led to the relocation of nearly four hundred families.[322] The communities asserted that such relocation 'not only eroded their property rights but that their spiritual, cultural and

[316] Ibid. Article 25(1), Resolution 217 A (III), provides for the right to adequate living standards, which includes housing with secure tenure.
[317] The Constitution (see note 12: 74).
[318] United Nations Committee on Economic, Social and Cultural Rights, General Comment 4 *The right to adequate housing,* 13 December 1991 UN Doc E/1992/23.
[319] *Marega v The Officer in Charge Harare Central Prison and Others* HH 3-16; TS Chinopfukutwa 'House Demolitions in Zimbabwe: A Constitutional and Human Rights Perspective' *Zimbabwe Rule of Law Journal* 1 (1) (2017).
[320] SADC Tribunal available at http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (Accessed:19 September 2017).
[321] *Centre for Minority* 5 *Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya*, Comm'n No 276/2003, African Commission on Human & Peoples Rights (2006) (hereafter the *Endorois* case).
[322] G Lynch 'Becoming indigenous in the pursuit of justice: The African Commission on Human and People's Rights and the Endorois' (2011) 111 *Afr Affairs* 24.

economic ties to the land were severed.[323] The government's action in using the powers of eminent domain effectively went beyond affecting the communities' economic well-being but their human rights as well. The court held that the Kenyan government action in relocating the community violated Article 8 (free practice of religion); article 14 (property), article 17(culture), article 21 (right to free disposition of natural resources, and restitution and compensation for dispossessed peoples) and article 22 (development), as guaranteed in the ACHPR and the Kampala Convention.[324]

In reaching this decision, the ACHPR took into account a number of issues such as the definition of property. The Endorois community asserted that the Trust Land Act[325] gave them traditional rights, interests and benefits from the land that concerned, a situation akin to the one in Zimbabwe under the Communal Land Act. The court also referred to the previous case of *Malawi African Association v Mauritania*[326] whereupon it stated that one's right to property does indeed include the use and access to the property to which states under article 14 have a duty not only to respect but protect as well.

Furthermore, consideration was given to the Pinheiro Principles with regards to compensation. In cases that one approaches the courts for a remedy, there should be given an 'appropriate remedy'. Further, in cases where property is destroyed, one such remedy should be compensation for the property concerned.[327] The Pinheiro Principles advance restitution before compensation also indicate that compensation should be paid in cases where restitution cannot be undertaken. The issue of providing compensation is also explicitly provided within the United Nations Declaration of Rights on the Rights of Indigenous Peoples (UNDRIP).[328]

The UNDRIP provides that 'indigenous peoples have the right to restitution of the lands, territories, and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, occupied, used or damaged without free and informed consent'.[329] These international principles and provisions are important especially in previous cases where communities such as those from Marange are still to receive their compensation. The mere payment of a disturbance allowance does not amount to compensation and at most flies 'in the face of common sense and fairness'.[330]

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[323] *Endorois* (See note 321:19).
[324] Kampala Convention (See note 34).
[325] Chapter 288.
[326] Comm Nos 54/91, 61/91, 164/97.
[327] The Pinheiro Principles available at https://2001-2009.state.gov/documents/organization/99774.pdf (Accessed: 24 September 2017).
[328] United Nations Declaration on the Rights of Indigenous People available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (Accessed:18 September 2017).
[329] UN Declaration on the Rights of Indigenous Peoples E/CN 4/Sub 2/1994/2/Add1 (1994) preambular par
[330] Ibid, par 236.

The Pinheiro Principles reiterate what is now already contained within the Constitution and therefore the need to enforce such provisions is imperative.

The Endorois community case highlights the need for the state to balance the need for development, interests and rights of communities. Since land forms the foundation to the communities' livelihoods, only a secure and respectful rights system is able to ensure sustainable development. Further, such a system can reduce conflict and risk once the developmental projects are established.[331] Governments, as they seek to establish developmental projects, should pause and reflect to see if the project fulfils the five criteria that are equitable, non-discriminatory, participatory, accountable, and transparent.[332] This is possibly one of the reasons why communities from Marange and Chisumbanje are complaining. In the Marange and Chisumbanje cases, Free Prior and Informed Consent (FPIC) was not given by the communities. Further, solutions that were suggested by authorities were not arrived at in a participatory manner. The lack of adequate consultation resulted in government and the investors viewing development in physical infrastructures such as schools and roads. The ACHPR is an important mechanism that can be used by communities to protect and ensure that their land rights are respected only as the last port of call when all internal remedies have been exhausted.[333] The Endorois case provides a good case study of how sustainable resource management, fulfilment of local and international legal commitments, attracting beneficial investments to the local community and country simultaneously and improving resource security is important.

4.6 Conclusion

Zimbabwe's new Constitution provides great opportunities upon which lessons can be learnt on how other nations have sought to strengthen communities land rights. Providing or elevating customary land rights to private land rights has been the most common measure that African governments have sought in the post-colonial period. However, it is sad to note that the new development trajectory has not achieved much. Further, titling without a corresponding rule of law well is meaningless. Communities on communal lands do not crave for access to financial resources as has been the major basis cited behind titling. What the communities seek is a place to establish a secure home. This can only occur when there is respect for the customary land system and applicable rule of law.

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[331] L Juma *Protection* of development-induced internally displaced persons under the African Charter: The case of the Endorois community of Northern Kenya.

[332] *Endorois* (See note 321:277). The criteria set out above are also embodied in art 2(3) of the UN Declaration on the Right to Development, UN GAOR, 41st Session Doc A/RES/41/128 (1986), which states that right to development includes, 'active, free and meaningful participation in development'.

[333] African Charter on Human and Peoples' Rights: Article 50.

On the other hand, governments must now be cognizant of what the majority populace may term as development but while least negatively impacting the immediate community, this is not sustainable. It should be noted that advancing and respecting communal land rights goes beyond mere access to land but should include considerations for human rights. There is enough regional, continental and international reference that can be used to demonstrate how development can be undertaken resulting in mutual benefit which the Zimbabwean government can take lessons in light of the constitutional values.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Summary of Research Findings and Discussions

This research sought to look at the current legal position governing communal land rights in the context of developmental projects in Zimbabwe. The analysis was guided by a number of objectives. These objectives included an understanding of the nature of communal land tenure system in Zimbabwe; examining the laws, policies, institutions and practices regulating land displacement and resettlement in Zimbabwe and exploring regional and international legal and policy framework regulating land displacements and resettlement in providing key lessons for Zimbabwe.

Tenure security, especially to communities residing on communal land governed by customary law principles, has always been a contentious issue during and after the colonial era. Customary land tenure is regarded the most insecure land tenure system currently applicable given the elevation and recognition of private land tenure as the best and superior mode of land tenure. Current government effort to address past land imbalances and create a more secure form of tenure has not addressed the previous challenges of communities residing under customary law. As a result, many Zimbabweans reside on land that is insecure.

On this note, the research's point of departure is that regardless of the current insecure land tenure system regulating were communities reside currently, there are some pieces of legislation currently operating that in their form and more so after amendments can result in a more secure land tenure system. The identified various pieces of legislation include the Traditional Leaders Act, Rural District Councils Act, Mines and Mineral Act and the Environmental Management Act. Reform of these pieces of legislation more particularly legislation with a direct bearing on customary land tenure, that is the Communal Land Act and the Land Acquisition Act should be undertaken in light of the Constitution which clearly identifies the need to provide security of tenure and recognition of property rights. Furthermore, the definition of property goes beyond one's ownership rights but now includes another bundle of rights such as 'interest' in the property concerned.

Furthermore, the Constitution offers greater opportunity for the protection of communities in instances were developmental projects are established on communal land. The Constitution clearly states that communities must be given reasonable time and notice and should be given fair and adequate compensation for their property developments regardless that there do not own the land promptly. This has been a major challenge presently facing communities. Interestingly, numerous opportunities have been created by the Constitution that all can be used to address communities' grievances. The community members themselves have the capacity to approach the court of law on their

own, approach independent commissions and public interest organizations can also support communities in the protection against violation of their human rights.

Important lessons can be taken from how other jurisdictions such as South Africa has sought to protect the rights of communities residing on communal land. South Africa provides contemporary lessons which can be fused to develop a system aimed at securing community land rights in Zimbabwe. It is evident that in order to secure communities rights to land, there is need for action backed up with legislative action aimed at formally addressing previously insecure rights that existed under colonization and simultaneously addressing the past imbalances. Also, securing communities land rights should not be seen in the context of property rights alone but within the broader EESCRs that are intrinsically intertwined with lands such as right to water and shelter. In order to attain a solid secure tenure that best works for communities in Zimbabwe, the assertion that providing title deeds will solve the challenge is misplaced. Lessons from Kenya and South Africa indicate that 'the edifice' does not meet the social, economic, environmental and cultural needs of these communities. Importantly it will also result is the further reinforcement of a European system dominance on the previously existing African culture. Zimbabwe therefore initially must deconstruct the notion that ownership is the alpha property right to which all other rights are subservient. This action will result in the establishment of parallel rights that operate in the same way and manner as ownership rights and therefore inevitably assisting the communities by providing a more secure land tenure system.

5.2 Recommendations

The nature and manner that developmental projects are taking are significantly changing globally. There is now stronger government involvement with local and international business partners thereby leaving the communities questioning whom will be able to protect their interests. Twenty-seven years after Zimbabwe gained independence, communities security of tenure has not significantly improved. In order to improve communities' security of tenure, it is recommended that:

Enacting and amending legislation aimed at securing communal land tenure

The Ministry of Land and Rural Resettlement working on recommendations that can be provided by the ZLC should propose a legislative enactment that officially and legally recognizes the social and off-register land tenure systems. The provision of title deeds as is usually the suggested means of securing communal tenure has not only proved to be a challenge but does not also recognize the various social norms and values which form the foundation of communal land tenure. Communal land tenure system does not fit well within the exclusive, western norms of property that strictly conforms to land use planning, surveying and conveyancing so as to assure accuracy of the title.

The Constitution in section 293(3) recognises ‘occupation’ and ‘use’ rights which need to be given effect through legislative enactments that effectively recognises separately use and occupation title. A legislative enactment would result in the provision of a secure legal tenure system for communities hence protecting their rights and interest to customary land in Zimbabwe. It is proposed that steps taken by South Africa in a bid to give effect to constitutional objectives through enacting legislation such as CLARA and ESTA are such examples the Zimbabwean government can draw lessons on how to secure currently insure community lands rights regime.

Respect, Protection and Development of the Property Rights system

Legal protection, recognition and strength of any land rights regime rest on the judiciary's interpretation and development of the law. A secure land tenure system does not merely become secure because one has within their possession a title deed or by the mere presence of legislative enactment. In cases of disputes emanating, the judiciary's role as an independent arbitrator and ability to give meaning to the Constitution text is imperative. The Zimbabwe Constitutional Court is well placed to develop the common law and give meaning of the term ‘property' within the broad framework of other often competing political and socio- economic constitutional rights and values. The judiciary should equally provide and develop effective redress mechanisms as contained in Article 12 of the Kampala Convention. The Constitutional Court progressive interpretation of the Constitution is also in guiding other constitutionally established institutions aimed at assisting in the fulfillment of the constitutional objectives. Independent bodies such as the ZGC, ZLC and the ZHRC can therefore use such judgments in their monitoring and investigation efforts of both natural and juristic persons respect and compliance with the Constitution.

Developing guidelines to be used in the establishment of developmental projects

The establishment of developmental projects in the agriculture, mining and infrastructure sectors should be steered by government established guidelines that indicate what should be considered, prior, during and after the project's establishment. Currently procedures that exists to guide projects developments are in fragmented legislation which furthermore is not comprehensive enough. The Environmental Management Agency, The Traditional Leaders Act and The Rural District Councils Act are some of the legislations that seeks to encompass issues that should be considered during projects lifecycle. However, these current legislative enactments are not comprehensive enough to details what should exist as projects are being established, circumstances which guidelines can address.

Development guidelines provide important information that can aid government officials in situations of relocations and resettlement which has caught most official unprepared.

The proposed guidelines can indicate in details salient issues legislation fails to capture such as what should be included during consultation processes, communication/ notice and valuation of properties as indicated in various international conventions Zimbabwe is a signatory.

Concurrently, the guidelines can also address issues such as compensation, respect of communities EESCRs and access to redress mechanisms emanating as a result of relocation. Local guidelines are imperative in ensuring that national economic benefits of the developmental project are amplified whilst simultaneously minimizing and mitigating the negative impacts that can manifest on the local host community. The United Nations has produced Basic Principles and Guidelines on Development-Based Evictions and Displacement whilst FAO produced Compulsory Acquisition of Land and Compensation Framework which can aid Zimbabwe as it seeks to develop its own local guidelines.

Legal awareness and capacity building

The law currently provides for opportunities that communities land rights can be protected. Communities land rights can further be strengthened when legislative enactments and amendment of some identified pieces of legislation are implemented. However, benefits of these laws will only be realised when communities themselves have the knowledge and ability to demand of these rights through legal channels. A Greater need exists to enable communities to communicate and capacitate each other in circumstances developmental projects infringe or are likely to infringe constitutional rights.[334] Local and regional mechanisms can be used to ensure that these rights are respected to ensure that developmental projects do not leave the communities worse off. The *Endorois* [335] is a case at point of where a community that was assisted to be aware of their rights ensured that the state respects these rights. In Zimbabwe, contemporary information exists that can be used to engage policymakers on the nature developmental projects can impact communities. The impact resultantly either positive or negative based on the nature, structure and nature of governments oversight.[336]

5.3 Conclusion

Communities customary land rights in Zimbabwe are under increasing threat from various developmental projects in the mining, agriculture and infrastructure sectors. An analysis of the current legal framework indicates that regardless of various procedural mechanisms that can be used to strengthen these rights, community's customary rights

[334] The Constitution (see note 12:85).
[335] *Endorois* (see note 321).
[336] C Bwenje, G Nicholas-Nkomo and T Dhlakama 'The Impact of Large Scale Investments on the Livelihoods of Smallholder Farming Communities: The Cases of Green Fuels and Tongaat Hullett Zimbabwe' *ZELA* 2017.

are inherently weak. The Constitution has however brought an interesting dynamic that can result in equal balancing of competing interests between the state ownership rights to land whilst simultaneously recognizing the right of communities ‘use’ of the land. All in all, the government, communities and all interested stakeholders have a role to play in ensuring that the current insecure community land rights system is addressed. Concerted efforts in addressing this challenge are mutually beneficial to the state, communities, developmental projects proponents that are eager to invest in areas currently regulated by the Communal Land Act and effectively the nation at large.

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